AN

ESSAY

TOWARDS THE

FURTHER ELUCIDATION

OF THE

LAW OF DESCENTS.

THE SECOND EDITION,

CORRECTED AND ENLARGED;

WITH AN

APPENDIX,

ON THE

DISTRIBUTION OF THE PERSONAL EFFECTS

OF

INTESTATES.

BY CHARLES WATKINS, ESQ.

OF THE MIDDLE TEMPLE;

AUTHOR OF A TREATISE ON COPYHOLDS, &c. &c.

LONDON:

PRINTED FOR R. PHENEY, INNER TEMPLE-LANE.

1801.

GEORGE WOODFALL, PRINTER, PATERNOSTER-ROW.

PREFACE.

THE Author of the following pages, when confidering the doctrine of Defcents, was frequently involved in difficulties which he was not able to remove, or by any means to fatisfy himfelf with refpect to, from thofe Treatifes which were expresfly dedicated to the inveftigation of that important fubject; and more efpecially with regard to the defcent of reverfions and remainders expectant upon eftates of freehold: he therefore found that his fole refource was patiently to turn over the pages of mifcellaneous authors, and to collect, out of the profufion of matter fcattered through the feveral volumes he perufed, the particular paffages which re-

 lated

lated more immediately to thoſe points; and, by adding ſome remarks as he went along, to illuſtrate what he thought was obſcure, or to connect the ſeveral paſſages he ſelected or referred to, to digeſt, in ſome degree, to regular method, the chaotic maſs, and form a concatenation through the whole. He purſued the ſcheme; and ſuch was *the origin* of the enſuing ſheets. As to *the execution* of the deſign, it is not *his* province to pronounce. All he ſhall ſay is, that he hopes the reader will not expect in ſuch collection the *ne plus ultra* of inveſtigation, or in thoſe obſervations a profeſſed treatiſe on the ſubject; but to remember that they are no other than a collection of a few authorities thrown together with a few remarks, with a deſign originally to ſatisfy his own doubts, and not urged by a preſumption of being capable of yielding inſtruction to others. However, from the approbation which ſome have been pleaſed to expreſs of them,

and

and in the hope that they may ſave to others the trouble which he has experienced, he is influenced to ſubmit them to the public eye; and ſhould they throw any further light on ſo truly intereſting a ſubject, the Author would feel himſelf ineffably happy in being in the leaſt inſtrumental to the elucidation of a doctrine ſo important and extenſive in its conſequences.

As theſe ſheets were not deſigned as a regular treatiſe on the ſubject, but merely to aſsiſt the Author in his reſearches, and to have recourſe to for the purpoſe of directing him at once to the ſeveral books in which the points he has collected might be found, when the hurry of the moment would not permit him to hunt his ſubject through volume after volume, he has been frequent in his references; and has ſometimes, perhaps, added obſervations and alluſions which ſome of his readers may

poſsibly think foreign to his purſuit: but as the intention of the work is thus explained, and as he has found thoſe obſervations and alluſions frequently uſeful to himſelf, he imagined that they might ſometimes prove ſo to others; and as they would take up but little room, he has ſuffered them to remain.

The approbation beſtowed upon the former edition, has induced the Author to correct and to enlarge the work; and he hopes, that, in the preſent edition, he has made it more extenſively uſeful.

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AN ESSAY

AN ESSAY ON THE LAW OF DESCENTS.

CHAP. I.

OF THE SEISIN OF THE ANCESTOR.

SECT. I.

Of the Necessity of an Actual Seisin.

Descent and purchase.

ANCESTORS, from whom hereditaments can be derived by descent, may be divided into those who have taken immediately by purchase, and those who have, themselves, succeeded by descent to the hereditaments claimed.

 There

There are, indeed, other methods of acquiring an eſtate in lands and tenements, to which eſtate the heirs of the perſon ſo acquiring may inherit; but, in compliance with the uſual mode of diviſion, eſtates are here conſidered as being taken either by deſcent or purchaſe: yet, though ſuch diviſion is thus followed, it muſt, nevertheleſs, be remembered, that it is by no means accurate. But poſitions of this kind are too commonly adopted implicitly; and writers, "copying each other from generation to generation," without ſufficiently attending to the nature, the cauſes, or the conſequences, of a particular rule, are often led to apply it to things which it was not originally intended to embrace, and embarraſs themſelves and their readers in endeavouring to ſubject them to it.

The rule we are ſpeaking of is thus frequently applied to matters which are abſolutely without its view, as it applies only to *the rightful eſtate of the tenant*, as tenant; or, in other terms, it is expreſsive of the modes

modes by which the law enables him to take ſuch eſtate. Nor does it, indeed, apply unexceptionably to him (*a*).

It has nothing to do with diſſeiſins, Diſſeiſin, &c.
abatements, &c. (*b*), which are eſtates [2]
gained by wrong (*c*). For when an eſtate ſo gained *deſcends* to the heir of the diſſeiſor, &c. the eſtate ſo taken by the heir is preſumed to be a rightful one until the

(*a*) See *poſt*. ch. 5. p. 156. of a remainder to the heirs of the body of a perſon who takes no eſtate himſelf; in which caſe the heirs take neither by deſcent nor purchaſe.

(*b*) *Co. Litt.* 3. b. 18. b. *Plowd.* 47. b.

(*c*) And note; an eſtate gained by wrong is always a *quaſi* fee. For wrong is unlimited, and not contained within rules; as if a tenant for life be diſſeiſed, the diſſeiſor gains a fee; ſo the uſurpation of an advowſon gained the fee at common-law, and now does ſo in all caſes to which the ſtatute of Weſtminſter IId. does not reach. *Hob.* 322—3. Elvis *v.* Archbiſhop of York, & *al.* 5 *Com. Dig.* 447. Seiſin (F. i.) 9 *Vin.* 81. Diſſeiſin. (A. 2.) 105. (I.) *Gilb. Ten.* 119. & *Watk.* N. xxi. p. 371. *Co. Litt.* 277. a. 296. b. N. (1). *Bro. Eſtates*, 17. 41.

See alſo *Co. Litt.* 3. b. 18. b. 153. b. 257. b. *Litt.* S. 279. & *Co. Litt.* 186. 1 *Burr.* 111. Taylor & Atkins, *v.* Horde, & *poſt*. S. 3.

contrary be ſhewn; and the entry of the diſſeiſee would, at common-law (*d*), have been tolled by ſuch deſcent, for the title of the heir is oſtenſibly juſt; and the law, on the ſuccefsion of the heir, does not enquire into the title of the anceſtor.

Eſcheat.

Again; it reaches not to the eſtate of the lord, as lord, *i. e.* when he takes by eſcheat (*e*). For, as to the eſtate which he holds of his ſuperior, whether the lord for the time being obtained ſuch eſtate by deſcent or purchaſe, he muſt be conſidered as a tenant; but relative only to the eſtate held of himſelf can he be conſidered as lord. If he, therefore, takes by eſcheat, he is without the rule.

When the lord granted an eſtate, the portion of his property, to another and his heirs, the grant, on the failure of ſuch heirs, neceſſarily ceaſed, and the lands returned to the lord. He, therefore, had

(*d*) See *Stat.* 32 *Hen.* 8. *c.* 33.

(*e*) *Vide Mich.* 37 *Hen.* VI. *pl.* 1. *Co. Litt.* 18. b. & N. (2) *Harg.* 2 *Bl. Comm.* ch. 15. p. 244.

a kind

a kind of reverſionary intereſt (*f*); though, from the ſame narrow way of thinking, we frequently conceive that ſuch reverſion cannot exiſt.

But the maxim that a reverſion cannot be expectant upon a fee, ought not to be applied in this caſe. A tenant having only a fee-ſimple himſelf, if he grant over that fee-ſimple to another, he, certainly, can have no reverſion, as there is nothing left in him. But the eſtate of the lord is to be conſidered upon different principles: the tenant has not his eſtate abſolutely for ever, but proviſionally only, *i. e.* as long as he ſhall have any heirs exiſting; and, conſequently, as this is not an abſolute eſtate, a reverſionary intereſt, or, however, one of that nature, muſt ſtill be in the lord. When an eſtate is given to a perſon and the heirs of his body, the reverſion continues in the donor. As the ſpecial heirs may fail ſooner than the general

(*f*) 1 *Sir Wm. Blackſt. Rep.* 133. 163. 2 *Bl. Comm.* ch. 15. p. 244. And ſee the form of the writ of *eſcheat* in the REGISTER, & *F. N. B.* 144. E. F.

ones, it is regarded as a leſs eſtate; and, conſequently, there may be a reverſion expectant on it. The donor has a larger eſtate than the donee, becauſe a failure of iſſue is much more likely to happen than a failure of heirs. The lord has a higher eſtate than a tenant in fee, becauſe the fee is determinable on the failure of the *tenant's* heirs; whereas his own eſtate is not ſo determinable (*g*).—And here, again, the eſtates of the lord and tenant in fee differ. Upon a grant in fee, the lord gave *a portion of* his eſtate; but on a feoffment, the tenant transfers *his whole intereſt*. He does not, ſince the ſtatute (*h*) *Quia Emptores Terrarum*, leave any thing in himſelf, but puts the grantee in his own place to all intents and purpoſes. To ſay that an eſtate in fee muſt laſt for ever, is

(*g*) As an eſtate for one's own life is greater, in conſideration of law, than an eſtate *pour autre vie*: thus, if A. be tenant for life, with remainder over to B. for life, and A. grant to B. for the life of B., A. will have a reverſion left in him. See *Co. Litt.* 41. b. 42. a. *Bro. Eſt.* 67. *Fitzh. Abr. Dower.* 55.

(*h*) See *Co. Litt.* 269. b. *Watk.* N. xxxvii. & lvi. to *Gilb. Ten.* p. 391. 400.

improper,

improper, as the failure of heirs thus determines it; it may, indeed, by poſsibility do ſo, and ſo may an eſtate-tail (*i*); and yet a reverſion is allowed upon the latter eſtate.

But there is another objection which may, perhaps, be thought to carry greater force, which is this; as the reverſion, if it be one, is expectant upon an eſtate in fee, there can be no meſne ſeiſin of it; and if ſo, how can it go, as it evidently muſt, to whoever has the manor or ſeigniory, in excluſion of the half-blood? But this objection, however plauſible, is, certainly, not juſtly founded. The deſcent of this intereſt differs eſſentially from that of the reverſion of the tenant. The one, indeed, can be no more the ſubject of an actual ſeiſin than the other. But here the caſes differ. The tenant has nothing to which the reverſion can attach; and, conſequently, the deſcent muſt be ruled by its own ſeiſin. The reverſion of the lord

(*i*) 10 *Co.* 44. a. Jennings's caſe. *Dougl.* 324. Davie *v.* Stevens. 1 *Pr. Wms.* 366.

is not ſelf-ſubſiſtent, but attached to his ſeigniory; it is, as it were, an incident or appendancy to it, and, therefore, ſhall follow it as its principal (*k*).

But when lands actually fall, the lord, in order to complete his title to the premiſes ſo eſcheated, ought abſolutely to enter or bring his writ of eſcheat; for if he neglect to enter or to ſue out his writ, or if he do any act which may amount to an implied waivure of his right, *his* title by eſcheat will be barred (*l*).

The embarraſſment of ſeveral authors, in endeavouring to bring the title by eſcheat within the rule, is evident alſo from this; their being ſometimes driven to conſider the lord as an aſsignee of the tenant, or as *ultimus hæres*. Now, as the lands cannot poſsibly eſcheat until the eſtate of the tenant be abſolutely expired, there

(*k*) See 4 *Co.* 11. a. &c. Bevil's caſe. *Harg.* N. (2). to *Co. Litt.* 18. b. & *poſt*. S. 4. p. 86.

(*l*) 2 *Blackſt. Comm.* ch. 15. p. 245. See *Co. Litt.* 268, a. & b, and *F. N. B.* 144.

can

can be nothing to aſsign; nothing to be inherited.

Yet, notwithſtanding what has been ſaid, as I intend, at leaſt principally, to ſpeak of deſcents as they relate to common individuals, or tenants (as ſuch) only, I think the uſual diviſions of eſtates into ſuch as are acquired by deſcent or purchaſe, ſufficiently correct for my preſent purpoſe.

If a perſon takes immediately BY PURCHASE, and the hereditaments purchaſed be corporeal, he generally, and indeed always if the inſtrument by which they are conveyed is founded upon feodal principles, at the ſame time acquires or receives the corporeal ſeiſin or poſſeſsion. If they are incorporeal hereditaments, and eſpecially if they are reverſions or remainders, whereof no ſuch corporeal ſeiſin can be had, then the property therein, whether it be veſted in poſſeſsion, or in intereſt only, or merely contingent, is fixed or ſettled in ſuch purchaſer, at the time of ſuch purchaſe made. [3] Anceſtor taking by purchaſe.

But,

But, whether the hereditaments purchafed be corporeal or incorporeal, or in [4] poffefsion or reverfion, yet, on fuch purchafe being completed, and the property in them being transferred, fuch purchafer immediately becomes the ftock of defcent, and the hereditaments fo purchafed become tranfmifsible to his own heirs.

Remainders defcendible.

And here it may not be improper to remark, that a remainder of inheritance, whether vefted or contingent, is tranfmiffible to the heirs of the perfon to whom limited (*m*), equally with an eftate which is

(*m*) See *Fearne on Contingent Rem.* 286. (3d edit.) and vol. i. p. 534. (4th edit.) 1 *Vefey*, 47. Hodgfon *v.* Rawfon, 237. Peck *v.* Parrot. 2 *Vef.* 119. Exel *v.* Wallace, and note †. 2 *Atkins*, 621. Chauncey & *al.* *v.* Graydon & *al.*

And, confequently, where fuch remainder is in fee, it fhall efcheat for default of heirs. *Bro. Ten.* 107. and fee *ibid*; *Prerogative le Roy*, *pl.* 251. and *Extinguifhment*, *pl.* 3.

And the lord may maintain an action of wafte, as the remainder-man might have done. See *Bro. ubi. fup.* and *F. N. B.* 58 G.

But he fhall not have his writ of efcheat during the life of the particular tenant; though he fhall have a writ

is veſted in poſſeſsion. For it matters not whether there be, or be not, a capacity in

writ of intruſion if a ſtranger enter on his death. *F. N. B.* 144. *B.* *Bro. Eſcheate*, *pl.* 6. & 22. *Waſte*, *pl.* 40.

For a remainder is held of the lord (*Bro. Tenures*, *pl.* 107. *Prerogative le Roy*, *pl.* 25. and *Extinguiſhment*, *pl.* 3.) as well as a reverſion, or particular tenancy, (See *Dyer*, 137. *pl.* 26. *Bro. Eſch.* 6. *Waſte*, 40. *Gilb. Ten.* 88.

But note, this is confined to a remainder *in fee*; for a remainder *in tail* is held of the donor, and, conſequently, cannot eſcheat to the lord of whom it is not holden. See *Bro. Eſch.* 21. *Kitch.* 111, 112.

And if the tenant in tail enter, and die without iſſue, the donor ſhall have a writ of *formedon*, and not of *eſcheat*. *F. N. B.* 144. A. & 219. E. &c.

If the donor *grant* his reverſion over to a ſtranger, the donee ſhall hold of ſuch ſtranger. *F. N. B.* 219. E. 2 *Co.* 92. a. & b.

But if lands be given to A. in tail, with remainder in fee to a ſtranger, the donee ſhall hold of the chief lord; as, in this caſe, *the whole eſtate* is conveyed. *Bro. Ten.* 21. *Dyer*, 362. *pl.* 19. 2 *Inſt.* 505. *Co. Litt.* 21. b.

If the tenant in tail has the reverſion in himſelf, there, although the two eſtates continue diſtinct, yet, as he cannot hold of himſelf, the tenure of the eſtate-tail is ſuſpended, and he is tenant to the lord in fee. See 2 *Co.* 92. b. *Bro. Ten.* 84. 107. *F. N. B.* 143. A. 144. A. *Dyer*, 235. *pl.* 22. 20 *Vin.* Ten. (H. a.) *pl.* 12.

And

in ſuch REMAINDER of veſting in poſſeſſion, if the poſſeſsion were to become vacant;

Relief. And it ſeems that, if the perſon having the fee-ſimple have alſo the *poſſeſſion* of the lands, though it be only in tail, he ſhall pay a relief to the lord on the deſcent of the fee. See 20 *Vin.* 252. Tenure. (H. a.) *pl.* 12. *Bro. Reliefe*, 2. *Fitzh. Abr. Reliefe*, 2. N. (a.) to *F. N. B.* 143. A. See *Dyer*, 252. *pl.* 22. 308. *pl.* 74. *Kitch.* 146. a. & b.

So where the tenant in tail holds, as ſuch, of the lord, as where the remainder is over to a ſtranger, he ſhall pay a relief if he have the poſſeſſion. *Kitch.* 146. b.

But if the perſon who ſo holds in fee or in tail of the lord, have *not* the poſſeſſion, as if there be a precedent eſtate of freehold in exiſtence, it ſeems that the relief is not leviable on the deſcent of ſuch fee or entail, during the continuance of ſuch precedent eſtate; as if it be to A. for life, remainder to B. in tail, remainder to the right heirs of B.; and B. die, living A.; the relief ſhall not be levied in A.'s life-time. *Kitch.* 146. b. *F. N. B.* 143. A.

So it ſeems, if there be a grant to C. in tail, with remainder to D. in fee; that C., being tenant to the lord, the relief ſhall be paid on the deſcent of *his* eſtate, and not on that of D. See before.

But if A. grant to B. in tail, and afterwards grant the reverſion over to a ſtranger, ſo that the tenant in tail ſhall hold of ſuch ſtranger, and the ſtranger hold over of the lord, it does not appear clear, whether any relief is payable to the lord on the deſcent of the reverſionary

cant; (for in either of these cases it shall be descendible;) but if a remainder be limited so as to be contingent *as to the* PERSON to whom it is limited, here, while there *is a want of capacity in such* PERSON to receive it, during such contingency, the remainder cannot possibly be inheritable; for as there is no person who can take, there is no person from whom it can be derived (*n*). [5]

Executory devises.

So also with respect to executory devises: if, or so soon as, there is a person

reversionary fee during the continuance of the estate-tail; there being no tenant to the lord entitled to the possession. Yet, *quære*; as by this mean, the lord may be defrauded of his relief. See *Keilw.* 83. b. 84. a. & b. & N. (1) to *Co. Litt.* 91. b.

As a tenant in tail shall hold of the donor as the donor holds over, it should seem that the donor should pay his accustomed dues and services, and that the donee should reimburse him, to the end that the lord of the seigniory should not lose his rights. See *Moore*, 890. *pl.* 1253. Rivet's case. *Gilb. Ten.* 173.

And we may here remark, that a possession *in law* only, is sufficient to entitle the lord to his relief. See *post*, 26. N. (f).

(*n*) See 1 *Fearne*, 534. 545. (4th edit.)

capable of taking the expectant fee, ſhould the anterior one happen to determine; then, or ſo ſoon, it is ſo far veſted or fixed (*o*) in ſuch perſon as to become tranſmiſsible to his heirs in a regular courſe of deſcent (*p*).

Poſſibilities. So, alſo, as to mere poſsibilities; they are deſcendible to the heirs of the perſons entitled to them, in the ſame manner as remainders or executory deviſes (*q*).

And

(*o*) *Lord Chancellor Talbot*, when ſpeaking of an intereſt of this nature, ſaid, "It does not indeed *abſolutely veſt*, becauſe the contingency may never ariſe: but it is carrying it too far to ſay *that it does not veſt at all*." And, accordingly, he decreed that it DID VEST *in ſuch manner as to become tranſmiſſible to the repreſentatives of the perſon entitled. Caſes Temp. Talb.* 123. King *v.* Withers; and ſee 2 *Veſey*, 119. note †. and *Fearne*, 160. (p. 341. vol. i. 4th edit.)

(*p*) *Fearne*, 444. (3d edit.) See 1 *Veſ.* 411. Wright *v.* Wright. 2 *Veſ.* 119. and note †. *Forreſter*, 121. King *v.* Withers. *Poſt*, ch. iii. ſec. 2. See 3 *Durnf. & Eaſt.* 88. Jones & *al. v.* Roe, leſſee of Perry. and 2 *Burr*, 1134. Selwyn *v.* Selwyn. 5 *Brown's Caſes in Parl.* 388. Wilſon *v.* Bayly & *Ux.*

(*q*) See 1 *Strange*, 131—6. Marks *v.* Marks. 2 *Atkins*, 618. Chauncey *v.* Graydon. *Forr.* 123—4. King

And therefore, in the cafe of A PURCHASER, the queftion is, Whether the property intended to be conveyed, limited, or transferred, of, or in, fuch hereditaments, WAS LEGALLY VESTED OR FIXED in fuch purchafer; or whether he was ever capable of taking fuch future intereft during the continuance of the particular eftate or anterior fee, fhould it chance to have determined or fallen? And *not*, Whether he ever had THE CORPOREAL POSSESSION of thofe which are corporeal, or WHAT IS TANTAMOUNT THERETO in incorporeal hereditaments? (as receipt of rent; prefentation to advowfon, &c.) For in many cafes, if fuch property be fixed BY PURCHASE, though the anceftor fo purchafing had never gained any *actual* feifin(*r*), yet his heir may inherit. [6]

First purchafer.

Fixture of property.

King *v.* Withers. 2 *Blackft. Comm.* 290. ch. xix. *Fearne*, 444. (3d edit.) 3 *Durnf. & Eaft*, 88. Jones & *al.* *v.* Roe, leffee of Perry; and 2 *Burr.* 1134. Selwyn *v.* Selwyn.

(*r*) In fact; See the cafe of Geary *v.* Bearcroft, *Carter*, 57. and *poft.* 18. 52. *in not.*

By

Livery of feisin and attornment.

By the feodal law, indeed, an actual and corporeal investiture or feisin, or a regular attornment, was essential to give completion to a transfer of property; but, at this day, by the introduction of conveyances unknown to that institution, at least when that institution had attained its maturity; for devises of lands were certainly known in countries where, and at
[7] times when, that system was received, though that system was as certainly then in its youth (*f*): At this day, I say, such actual

(*f*) That devises were known in this kingdom in the time of the Saxons, see *Bacon on Eng. Gov.* b. 1. ch. xli. p. 68. fol. (edit. of 1739.) *Sullivan's Lect.* lect. xv. p. 145. 75th *Law of Canute*, *Tyrr. Hist. Eng.* b. 6. p. 60. vol. i. fol. *Lambarde's Peramb. Kent*, 441. 492. *Somner of Gavelk.* 84. Appendix, 197. 211. (edit. 1726.) *Robinson on Gavelk.* b. 1. ch. ii. p. 30. b. 2. ch. v. p. 234. 242. 2 *Blackst. Comm.* 373. ch. xxiii. See *Hale's Comm. Law*, 251—2. ch. xi. (Runnington's edit.) *Co. Litt.* 111. b. and note (1). *Powell on Devises*, 1.

Of the origin of the feudal system.

Laborious have been the researches into the origin of feuds, and many and discordant have been the hypotheses advanced: while some preposterously deny their establishment till the system had attained its perfection,

actual or corporeal ſeiſin is, in many caſes, [8]
not indiſpenſably neceſſary to the veſting
or fixing ſuch a property in hereditaments [9]
as

fection, others, from the analogy which ſeveral of the cuſtoms of barbarous nations bear to thoſe of feudal uſage, imagine they diſcover traces of this ſyſtem in almoſt every ſtate upon earth.

The polity of rude nations muſt have been ſimple, and ſuch as their ſituation and neceſſities prompted, rather than the reſult of philoſophical enquiry. All nations were originally rude: all nations had external enemies, and internal connections and dependencies. When population increaſed, they endeavoured to enlarge their borders. The wants and conſtitution of man urged him to ſociety; ſociety, as it conferred mutual benefits, required mutual aids. The idea of A PUBLIC or A STATE at length prevailed. Subordination and rule were found abſolutely neceſſary to the defence and well-being of ſociety. When they had acquired new territories, they muſt have defended them; hence thoſe who ſhared in the conquered lands, contributed to the general defence. Men, ſecure under the ſhadow of ſociety, cultivated their polity, and ripened the ſuggeſtions of the moment into a regular ſyſtem. Among a nation of ſavages there muſt have been freedom: "The chief of a petty plundering nation can never be deſpotic; the ſpoil is ſhared in common, and each individual defends his liberty as his own peculiar treaſure. The firſt kings of Rome (ſays Voltaire,)

as to make them defcendible to the heirs of A PURCHASER.

Thus

Voltaire,) " were like the captains of the Buccaneers."(1).

From circumftances thus fimilar, can we be furprized at fimilar ufages? Hence the analogy between the cuftoms of barbarous nations (2).

To illuftrate this, let us advert to the decimal divifion of ftates. The celebrated divifion of this kingdom into counties, hundreds, and tythings, and the making each perfon in fuch tything anfwerable for his fellows, has been much and defervedly extolled for its wifdom, and generally attributed to Alfred. But fuch divifion feems to have been (at leaft in fome meafure, though, perhaps, not in its perfect eftablifhment) prior to that immortal man.

The divifion of a ftate into lefs diftricts would be one of the earlieft efforts of its civil polity (3). And we fhall prefently fee the caufe of fuch divifions being *decimally* made.

Some

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(1) See 1 *Voltaire's Spirit of Nat.—Prelim. Difc.—Philofophy of Hift.* 428. and *Mall. North Antiq.* vol. i. ch. 8. p. 163—4.

(2) See Pref. to *Mall. North. Antiq.* p. ix. *Fergufon on Civil Society*, part 1. ch. 1. and part 2. f. 1. and 2 *Robertfon's Amer.* B. 4. N. lxii. *Squire's Anglo Sax. Gov.* S. 7. 11. 13. N. (6). 19. 20. 21. N. (3). 26. 27. 31. 32. 35. &c. *Macpherf. Differt. on the Caledon. Differt.* xii.

(3) See *Whit. Hift. Manch.* b. 1. ch. 8. fec. 4. p. 369. *Nor. Antiq.* vol. i. ch. 8. p. 174. 181.

Thus livery of ſeiſin was, by the common law, and ſtill is, abſolutely eſſential to Feoffment. [10]

Some have ſuppoſed the origin of counties to have been from the government of the nations remaining in the conquered countries of Europe, who retained their lands *in allodio* (4). However, counties, and hundreds, and tythings alſo, ſeem much more ancient than the time of Alfred, and to have been common to the northern nation (5).

That they, or ſomething very analogous to them, were known to the Britiſh and Celtic nations, is alſo clear (6). The Romans had, in very ancient days, their centurians, deans, &c. The Hebrews alſo had their rulers over thouſands, over hundreds, over fifties, and over tens (7). The Germans and other gothic nations ſeem to have been acquainted with hundreds (8). In

(4) See *Dalrymple on Feud. Prop.* 9. *Sullivan's Lect.* 51. 197. 245. *Spirit of Laws*, b. 30. ch. 17, 18.

(5) See *Mill. View of Eng. Gov.* b. 1. ch. 6. p. 118. b. 1. ch. 9. p. 177. *Forteſcue on Mon.* pref. xxxii. and p. 112. *Sullivan*, 245. *Spirit of Laws*, b. 30. ch. 17. vol. ii. p. 376—7. *Bickn. Alf.* 204. note. Pref. to 3 *Co.* 7. b. and to 9 *Co.* 9. b. *Co. Litt.* 168. a. & b. and note (6). *Stuart's Diſſ. on the Engl. Conſt.* part 4. ſec. 3. p. 250. & N. 5. *Squire*, S. 81. & N. (4). 83. 87. 2 *Rapin*, 154, &c. (8vo. edit.).

(6) *Whit. Mancheſter*, b. 1. ch. 8. ſ. 4. p. 370. and 1 *Warr. Wales*, b. 3. p. 185—6. (8vo. edit.) See *Squire*, *ubi. ſup.*

(7) See *Lowman*, c. 9. p. 162. and *Squire*, ſ. 20.

(8) *Whit. Manch.* b. 1. c. 8. ſ. 4. p. 370. 1 *Blackſt. Comm.* 116. *Bacon on Eng. Gov.* b. 1. c. 25. See *Adair's Hiſt. Amer. Ind.* 15. and note. *Stuart's Diſſ. on Eng. Conſt.* pt. 4. ſ. 2. p. 229.

[11] to the completion of a feoffment; without it the deed was a mere nullity, and conveyed no property whatever to the feoffee; insomuch

In China a practice prevails nearly similar to our own division of hundreds and tythings: their towns are divided into four parts, (this, I presume, follows from the *form* of their towns, which is *square)* (9); and these into smaller divisions of *ten* houses each, &c. &c. (10). In Japan, they establish one out of every five heads of families as a magistrate over the rest (11). But what comes nearest to our own mode of division seems to have been that of Mexico and Peru. Peru was divided into small districts containing ten families each: five of these composed a higher class of fifty families; and two of these last composed another called an hundred: ten hundreds constituted the largest

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(9) See *Mem. Acad. Scien. Paris*, vol. v. p. 296. *Hist.* 1718. art. vii. and see the *Code of Gentoo Laws*, ch. 14. p. 172—3. (8vo. edit.) and *Numb.* ch. xxxv. 5.

This form of towns was common in the East. Babylon and Damascus were squares: Nineveh a parallelogram.

And note; the Welch had a *quadruple division:* thus, 4 *Erw* made 1 *Tyzyn*; 4 *Tyzyn* 1 *Rhandir*; 4 *Rhandir* 1 *Gavael*; 4 *Gavael* 1 *Trev*; 4 *Trev* 1 *Maenawr*; 12 *Maenawr a* 2 *Drev* 1 *Cwmmwd*; 2 *Gwmmwd* 1 *Cantrev.*—*Owen's Welch Dict. voce Cantrev.* and see *Taylor on Gavelk*, c. vi. p. 96. &c.

Though, perhaps, this proceeded only from the general custom of dividing things into halves, and those halves into quarters.

(10) See *Le Compt's Hist. of China*, 291. See also 2 *Rapin's Hist.* 157.

(11) *Spir. Laws*, b. 14. ch. 15.

inſomuch that if the feoffee had died be- [12]
fore livery, ſuch livery could not be made
to

largeſt diviſion, conſiſting of a thouſand families, &c. (12).

Moſt nations reckon by tens (13). The Athenians divided their city into ten parts or tribes, &c. The tithes or tenths were paid to kings, &c. by many ancient nations beſide the Jews (14).

An

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(12) See *Mod. Univ. Hiſt.* vol. xxxviii. p. 469. and vol. xxxix. p. 14. 3 *Blackſt. Comm.* ch. 4. p. 31. And ſee Of the *Hindoo* Diviſions, *Code of Gentoo Laws*, Pref. p. 115. & c. 17. ſ. 6. p. 230.

(13) The ancient *Scandinavians*, indeed, had a great reſpect for the number *twelve*; and from them ſeems the number of our jury to have been derived. It is obſervable, that we, to this day, reckon to twelve; but then we return to ten: we do not ſay one and twelve, but thirteen, and continue by *tens*. It is obſervable alſo, that our *ſcore* conſiſts of *two tens*—*twenty*—*twi ten*. And to our Saxon anceſtors are we to attribute the cuſtom of numbering to twelve. See further, *Nor. Ant.* vol. i. ch. 4. p. 61—65. ch. 7. p. 133—138. ch. 8. p. 169. ch. 13. p. 356. (note). and vol. ii. p. 7. *Edda, Fab.* 1. & note (A). and p. 41. & N. (C). *Fab.* vii. 3 *Blackſt. Comm.* 349. ch. 23. and p. 365. and note (*b*). See alſo 3 *Roll. Anc. Hiſt.* b. 5. art. iv. and compare with *Mal.* c. 4. p. 58. and Pref. to *ibid.*

The Welch reckon to *ten*; and then they ſay *one* and *ten*, and not eleven; and ſo continue till *five* and *ten*, which anſwers to our *fifteen*. They then ſay *one* and *fifteen*, or *one*, *five*, and *ten*; and ſo on to *four* and *fifteen*; and then twenty, or a ſcore; and ſo on till *ten* and *twenty*; *one*, *ten*, and *twenty*, &c. to *two twenties*: and continue by *twenties* or *ſcores*. It is obſervable, that their term for a hundred, or ten tens, is *cant*, which ſignifies, *a complete ſeries of numbers*. See *Owen's Welch Dict. voce Cant.*

(14) See *Clayt. Chron. of Hebrew Bible*, 102. *Roll. Anc. Hiſt.* b. 2. part. 2. ch. 1. b. 6. ch. 2. art. ix. *Patrick on Gen.* xiv. v. 21. xxviii. v. 22. See 1 *Samuel*, ch. 8. v. 17.

[13] to his heir; nor could he inherit without it (*t*). As the anceſtor had no property in

An effect ſo general muſt have had as general a cauſe. The diviſion of our own kingdom ſeems neceſſarily to have flowed from the then ſtate of ſociety prevailing among us; the hiſtory of which aſſociations in this iſland is deduced with great ability by Profeſſor Millar (15). Yet the *decimal* arrangement of thoſe diviſions is ſuppoſed by many to have been derived from the eccleſiaſtical polity, and that from the Moſaic inſtitutions (16). But that ſuch decimal arrangement was *not* from the Moſaic inſtitution is clear, in that we find it among nations who were wholly unacquainted with either the Jewiſh or the Chriſtian polity.

As the method of reckoning by tens was thus common to moſt nations, we muſt ſeek a cauſe which was equally common to them: and this cauſe, moſt probably, was the number of thoſe natural inſtruments of notation which every one carries about him, the fingers. This was a cauſe common to all, and which, therefore, all might have followed (17). This method of

(*t*) See *Co. Litt.* 52. b. See alſo *Buller's Niſi Prius*, 256—7. See 1 *Burr.* 92. Taylor *d.* Atkins, *v.* Horde & *al.*

(15) See his *View of Engl. Gov.* and alſo *Squire* on *Angl. Sax. Gov.*

(16) See *Millar*, b. 1. c. 6. p. 114. *Bacon on Eng. Gov.* part. 1. c. 26. (fol. edit. 1739.)

(17) See *Millar's View of Eng. Gov.* b. 1. ch. 6. p. 115. and note ‡. *Adair's Amer. Ind.* arg. vi. p. 74. &c. 136. and ſee *Capt. Cooke's 1ſt Voy. Deſcript. of Otaheite.*

in the hereditaments intended to be conveyed, he could communicate none to his poſterity; [14]

of reckoning was ſimple; and ſimple muſt have been the method of early times, when people were yet rude. The American Indians are yet ſavage, and they continue to make uſe of this method to this day (18). More examples of general congruity might be ſelected, (as the trial by ordeal, for inſtance:) but when we find a cauſe to be general, ſhall we be ſurprized at a general effect?

From the ſame ſource are we to trace the analogy between the uſages of barbarous ſtates and thoſe of the feudal ſyſtem. But yet the cauſes of the irruption of the northern invaders of the empire, and their views of conqueſt, and more eſpecially the condition of thoſe among whom they ſettled, were almoſt peculiar to themſelves, and eſſentially different from thoſe of moſt, if not all, others, who thus went conquering and to conquer; and therefore their ſyſtem of government muſt have been, in ſome degree, ſingular (19).

But ſtill this originally ſimple, though latterly ſo complicated, yet well-concerted ſyſtem, ſo generally eſtabliſhed in Europe, ſeemed calculated only for a nation of warriors, in their progreſs from an horde of ſavages to a ſettled ſtate. Ill-adapted to a refined or refining age, its corruption, its decline, gave birth to a conſtitution, more fitted for a community of MEN.

Our

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(18) See *Adair* as above.

(19) See *Dalrymple's Feud. Prop.* ch. 1. And *Miller*, b. 1. ch. 4. p. 71.

[15] Death of the devisee before that of the devisor.

posterity; in the same manner as if a devisee had died before the devisor, his heir could

Our British ancestors were once savages like the rude natives of America; and were the Britons our contemporaries, and not our progenitors, we should regard them less partially, and more readily allow the equality. Our Germanic forefathers were also savage: the northern nations were addicted to rapine and war, were rude and uncultivated; they even placed the happiness of a future state in cutting each other to pieces, and drinking beer from the scull of an enemy! (20).

When an horde of these warriors settled in a country, they were yet *a people*, and required the assistance of each other, while thus surrounded by foes. Though the country was portioned out among the several individuals entitled, yet each could not have defended his property by his own arm. The individuals were united, and formed a state. Hence were provisions of a military nature reserved. And as the causes of early nations were, in general, very similar, the effects were very similar also. Thus we discover usages analogous to those of the feudal system in various states. We descry the rudiments of it among the Scythians (21), and

(20) See the *Edda*; *Fab.* xx. *Ode of Regner Lodbrog. Nor. Antiq.* v. i. c. 6. p. 120. c. 12. p. 310. v. ii. p. 105—111. & p. 232—3. and compare with *Adair*, 65. 135. and *Roberts. Amer.* B. 4. N. lxix. See also *Millar's View*, b. 1. c. 5. s. 2. p. 107. *Falc. on Clim.* b. 6. c. 2. p. 347. and *Roll. Anc. Hist.* b. 6. c. 1. s. 3.

(21) *Hor.* lib. iii. ode 24, and see *Roll. Anc. Hist.* b. 6. ch. 1. s. 3. *Mall. N. A.* pref. and ch. 2. 4. &c.

could not have ſucceeded. The death of [16]
the deviſor is as eſſential to the completion
of

and we trace it through the countries which they overran (22). In the ſeveral ſtates of Europe which they invaded, we find it eſtabliſhed in a greater or a leſs degree: we obſerve the ſame cuſtoms in their progreſs in Aſia (23): and we obſerve too, at leaſt its reſemblance, even in the remote iſland of Japan (24). In ſeveral parts of Europe a ſyſtem very ſimilar, if not, originally, the ſame, ſeems to have prevailed long before the invaſion of the Gothic tribes. WHITACRE finds it in the Britiſh polity, and thinks it coeval with the firſt government of our iſland; and thence extends it to other Celtic nations (25). LOWMAN points out a great ſimilarity between the Hebrew and feudal ſyſtems (26). An analogous uſage prevailed alſo, it is ſaid, in the New World; in Mexico, Peru, &c. (27); and even in the iſlands of the Pacific Sea (28).

That

(22) See *Volt. Spir. Nat.* v. ii. c. 91. p. 248. and *Mall. N. A. ubi ſup.*

(23) *Volt. ubi ſup.* and 1 *Robertſ. Charles V.* ſ. 3. p. 228. & 470. Note (YY).

(24) See *Linſchoten*, b. 1. c. 26. p. 46.

(25) *Hiſt. Manch.* b. 1. c. 8. ſ. 3. and ſee 1 *Warr. Wales.* b. 3. p. 186. 195. 246. and *Tayl. on Gavelk. paſſim.* and *Wright's Ten.* 48. N. (e).

(26) *Lowm. on the Civil Gov. of the Hebr.* c. 4. and ſee *Ainſw. on the Pentateuch.*

(27) See *Volt. Spir. Nat.* v. 3. c. 147. p. 216. and *Robertſ. Amer.* b. 7.

(28) See *Cooke's Voy.* Deſcription of the Friendly and Society Iſlands.

of the devise, as the livery of seisin is to the completion of the feoffment. In both cases,

That this system was known, however, to our German ancestors, is clear; and by them established in the countries through which they passed, or in which they settled. By them was it planted, or at least improved, in our island; though it did not receive its completion till the arrival of the Norman race (29).

To argue that it was not known to the Saxons, because it was not matured till the Norman æra, is absurd. Can nothing exist till it is perfect? As there are causes common to all, or almost all, nations, there will be suggestions equally common: but the improvement of what is thus suggested must depend upon the several states. When we seek into the usages of early times, let us be careful to attribute them to simple causes (30).

I well know that the feudal system was not fully completed till the Norman period; all I contend for is,

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(29) See *Millar*, b. 1. c. 4. b. 2. c. 1. p. 259. and note *. *Sullivan*, lect. ii. and iii. *Law of Forfeiture*, 45. *Stuart's View of Soc. in Eur.* b. 1. c. 2. s. 1. *Ferguson on Civ. Soc.* part 1. s. 2. *Mall. Nor. Ant.* vol. i. c. 8. p. 156. See *Spir. of Laws*, b. 11. c. 6. b. 30. c. 1. *Hargrave's Note to Co. Litt.* 64. a. note (1). 2 *Bla. Comm.* c. 4. *Bac. on Eng. Gov.* *Dalrymp. Feud. Prop.* ch. 1. *Runnington on Hale's Com. Law*, c. 5. p. 107. note (*h*). 2 *Tyrr. Gen. Hist. Eng.* Introd. p. 86. *Stuart's Diss. Antiq. Engl. Const.* part 2. s. 1. and part 2. s. 4. *Squire, passim.*

(30) See *Stuart's View of Soc. in Eur.* b. 1. c. 2. s. 4. p. 54. (4to edit.) *Dalrymple on Feudal Prop.* ch. 1. p. 7—8. *Stuart's Diss. Ant. Eng. Const.* part 2. s. 4. p. 123. N. part 4. s. 2. p. 222. and s. 3. p. 247. 2 *Roberts. Amer.* b. 7. p. 299. (4to. edit.)

caſes, as they could not operate before their conſummation, there was nothing conveyed; and conſequently nothing could be inherited (*u*).

[17] Conveyance incomplete in the life of the anceſtor.

Here the feoffment was not perfected till the livery of ſeiſin given, and ſo nothing paſſed to the anceſtor; but there are caſes where the purchaſe may be ſo far complete in the life of the anceſtor, who dies before the perfection or ultimate eſſential

is, that it was known, (however imperfectly) to the Saxons, and that they permitted the deviſing of lands. "The feudal ſyſtem, (ſays SIR JOHN DALRYMPLE,) was not eſtabliſhed at once in England, but by degrees; the ſame was its progreſs in every other country in Europe (31)."

Some acquaintance with the feudal laws ſeems abſolutely eſſential to the elucidation of our own, as they are relative to property, &c. Yet neither LITTLETON nor SIR EDWARD COKE appears once to have alluded intentionally to them; and ſtill BARON GILBERT illuſtrates the works of *both* of thoſe celebrated authors, by recurring to *feudal* principles!

(*u*) See *poſt*, ch. 4. p. 135.

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(31) *Dalrymp. Feud. Prop.* c. 1. p. 17. and 23. and ſee *Wright's Ten.* c. 3. p. 135. &c. and N. (a). (b). *Kaims's Eſſ. on Brit. Antiq.* Eſſ. 1. p. 23.

of

of ſuch purchaſe, as to fix an inheritable property in him, ſo as to enable *his* heirs to *ſucceed* BY DESCENT to the hereditaments purchaſed, notwithſtanding ſuch deficiency of an abſolute perfection: as where a fine had been levied, *ſur cognizance de droit tantum*, &c. to A. in fee; and afterwards, but before execution, A. died; yet his heir might have entered: and though he were the firſt who entered, yet he ſhould have been in BY DESCENT, and a poſthumous nearer heir might have entered on him; it being a rule(*x*), that where the heir takes any thing which

Fine. Cognizor dies before execution.

Yet the heir in by deſcent.

(*x*) See 1 *Co.* 98. a. and b. *Moore*, 140—1. ca. 281. (*Shellie's Caſe.*) Of this rule ſee *Douglas*, 506, note. 1 *Fearne*, 102. (4th edit.) 2 *Burrow*, 1106. Long *v.* Laming. 1 *Hargrave's Law Tracts*, 497. 551. 2 *Bla. Comm.* ch. 15. p. 242. *Butl.* N. (1). to *Co. Litt.* 376. b. 1 *Bro. Chanc. Ca.* 206. Jones *v.* Morgan.

Si terre ſoit done a un home a term de ſon vie, le rem. a un auter a terme de vie, le rem. al. iij. en le tail, le rem. en fee as drt. heirs le primer tent. en le rem. ſi touts fuer. morts, le droit heire celuy en le primer rem. ſerra adjudge eins per Diſc. de Heritage, *purr ceo q. ſon Aunc. per poſſibility purr. aver ewe Enherit.* Trin. 11. *Hen.* iv. *pl.* 14. *fol.* 74. b.

might

might have veſted in the anceſtor, the heir ſhall be in BY DESCENT.

Here, by the levying of the fine, the right was acknowledged on an adverſe ſuit (*y*), to have been in the anceſtor; and, [18] conſequently, *his* right was eſtabliſhed; and the delivery of poſſeſsion, on the writ of *habere facias ſeiſinam*, was only to inveſt him with the actual ſeiſin of that which was confeſſed to have been in him of right, by a matter of record, and of which he had already a ſeiſin in law (*z*). And here this case

Seiſin in law.

(*y*) See *Mr. Hargrave's note* (*c*) *to Co. Litt.* 121. a. and 1 *Cruiſe on Fines*, 25.

(*z*) *Co. Litt.* 266. b.

And obſerve, that, ſince the ſtatute 27 *Hen.* 8. the *ceſtuy que uſe* has the actual poſſeſſion of the lands by virtue of that act; for as, on a fine, an uſe muſt neceſſarily ariſe, ſo now that uſe is immediately executed. See 13 *Vin.* 266. Fine (X. 3). *pl.* 3. 1 *Cruiſe*, 56. &c. ch. 4. *Touchſt.* 4. and notes.

Yet the cognizee cannot bring treſpaſs before an actual entry. 2 *Leon.* 147. *pl.* 182. Berry *v.* Goodman. but ſee *Cro. Eliz.* 46. Anon.

So in the caſe of a bargain and ſale, the bargainee is in the actual poſſeſſion by virtue of the ſtatute, ſo as

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[19] case differs from the case before put of a feoffment: in this, the right and property were

as to fix the property in him; and also as to the assignment or transfer of such property over; but he cannot bring trespass before his actual entry. *Carter*, 57. &c. Geary *v.* Bearcroft.

But note: a *common recovery* vests no freehold, either in deed or in law, nor does any use arise on such recovery, before execution served. See *Moore*, 141. case 281. Shellie's case. *Jenk. Cent.* 249. *pl.* 40. *Co. Litt.* 266. b. note (2). 2 *Cruise*, 134.

So that if an elder brother suffer a recovery, but no execution be sued, it will *not* make a sister to inherit in exclusion of the half-blood. See *Plowd.* 43. b.

Yet, if the person suffering a recovery die before execution, execution shall, in many cases, be sued out against his heirs: so that *when served* it shall have relation to the act of the ancestor, and the heir be in *by descent:* as where A. suffered a recovery with the use (among other uses) to the heirs male of his body, and died before execution; on execution served, his heir was adjudged in by descent. *Shelly's case*, 1 *Co.* 93. b. 106. b. See *Co. Litt.* 361. b. 7 *Co.* 38. a. See also 5 *Burr.* 2786—7.

If a man recover an advowson, and the bishop collate by reason of lapse, it shall be a sufficient execution of the recovery to cause a *possessio fratris.* See 1 *Leon.* 234.

See further, of Execution: Of *Fines*, 1 *Cruise*, c. 1. p. 3. c. 4. p. 57. *Shep. Touchst.* c. 2. p. 4. *Coke's Readings*,

were fixed in the anceſtor before execution; in the other, the livery of ſeiſin was neceſſary to the fixture of ſuch property: as the ſeiſin was not given, the property was not fixed.

But yet it muſt be obſerved, that though the heir thus took *by deſcent* from the anceſtor to whom the fine was ſo levied, ſtill was he conſidered in a light which differed from that in which the common heir was taken: he ſhould not have been in ward; neither ſhould he have had his age; nor would he have tolled the entry of him who had right (*a*); (which are the characteriſtics, in ſome meaſure, of an eſtate by purchaſe.) Thus was he a being of a mongrel kind; ſomething, as it were, between an heir and a purchaſer; partaking of the nature of both, though more nearly agreeing to the deſcription of the former [20]
than of the latter.

Readings, Read. 2. *Tracts*. 230. 3 *Comyns's Dig.* Execution (A. 6.) and Fines, (E. 9.)

Of *Recoveries*: 2 *Cruiſe*, c. 6. p. 134. See *Dyer*, 35. *pl.* 28. *Ibid.* 373—4. *pl.* 15. *Comyns*, as above.

(*a*) See 1 *Co.* 98. b. 106. b.

Again,

Copyholds. Again, with reſpect to copyholds; if a ſurrender be made to the uſe of A. in fee, and A. die before admittance, yet the heir of A. ſhall be admitted; and upon ſuch his admiſsion, he ſhall be in BY DESCENT from the ſurrender, to which the admittance relates (*b*).

Exchange. So alſo in the caſe of an exchange: If *both* parties die before *either* enter, the exchange is void: but if *one* enter, and the other die before entry, yet his heir may enter, and ſhall be in BY DESCENT (*c*).

Deviſe. So, in caſe of a deviſe to A. in fee, and A. die after the deviſor, without having ever made any actual entry himſelf; yet his heir may enter, and ſhall take BY DESCENT (*d*), (though the deviſee had but a

(*b*) See 5 *Burrow*. 2786—7. Vaughan *d.* Atkins, *v.* Atkins; and ſee *Gilb. Ten.* p. 288. *Robinſon on Gavelk.* b. 1. c. 6. p. 98. 6 *Viner's Abr.* Copyh. (B. e.) 1 *Com. Dig.* 615. Borough Engliſh. *Carthew*, 275—6. Benſon, *v.* Scott. 1 *Watk. Copyh.* 103.

(*c*) See *Perkins*, ſ. 285, 286. and 1 *Rep.* 98. b.

(*d*) See *Cro. Car.* 200. Hulm, *v.* Heylock.

ſeiſin

ſeiſin in law (*e*). So alſo, on a deviſe by cuſtom before the ſtatutes of Hen. VIII. the heir of the deviſee might have had a writ of *ex gravi querula*, if the deviſee had died after the deviſor, and before entry (*f*). [21]

If a perſon takes a remainder at the time of its creation, otherwiſe than by way of uſe or deviſe, the ſeiſin is delivered to the particular tenant of the freehold; which ſeiſin ſhall enure and give effect to all the remainders limited thereon (*g*). In caſe a remainder Remainder.

(*e*) See *Co. Litt.* 111. a. 240. b.; and ſee *Jenk. Rep.* 227. *pl.* 92. and *Dyer*, 221. *pl.* 16. Biſhop *v.* Biſhop. *Dr. & Stud.* Dial. 2. c. 33. *Touchſt.* 455. *Bull. N. P.* 103. 2 *Mod.* 7. *Co. Litt.* 214. 236. *Plowd.* 412, 413. 10 *Co.* 40. b. 1 *Leon.* 290. ca. 293. Matheſon *v.* Tret. 3 *Bl. Comm.* 168. ch. 10.

(*f*) See *F. N. B.* 199. B. 200. B. and compare with *Co. Litt.* 111. and *F. N. B.*. 200. B. and note (*a*), p. 463. of 8th edit. 1755, 4to.

(*g*) See *Litt.* ſ. 60. 450. See alſo 1 Vent. 260—1. and 2 *Bl. Comm.* 167. ch. 11.

So the admiſſion of the particular tenant for life or years of copyhold premiſes, is the admiſſion of him in remainder; but ſo as not to prejudice the lord of his fine, where, by cuſtom, ſuch fine is due. See 4 *Co.* 23. a. Fitche's caſe. 2 *Levinz*, 107. Blackborne *v.* Greaves.

[22] remainder be limited by way of uſe or by deviſe, as theſe modes were introduced, (the latter, perhaps, revived; ſee *ante*, p. 7. and note (*k*), ſince the decline of the feudal ſyſtem, there needs no livery to be given at all; yet the remainders ſo limited become equally tranſmiſsible to the heirs of the deviſee, or *ceſtuy que uſe*. And it is the ſame with reſpect to executory deviſes, contingencies, and poſsibilities (*h*).

Attornment.

If a perſon took a remainder by a meſne grant, ſuch grant was anciently attended with attornment; but now attornment is not neceſſary (*i*).

In

Greaves. 1 *Vent.* 260—1. Batmore *v.* Graves. *Moore*, 358. *ca.* 488. Dell *v.* Higden. 465. *ca.* 658. Tiping *v.* Benning. 1 *Mod.* 102. and 120—1. Blackborne *v.* Greaves. *Lex Cuſtumaria*, ch. 17. p. 152. ch. 18. p. 166. *Gilb. Ten.* 163. 194. *Co. Compl. Copyh.* ſ. 56. p. 130. and *Supplement*, ſ. 7. p. 162. See 2 *Comyns's Dig.* 391. Copyhold, (G. 9.) 6 *Viner's Abr.* Copyh. (P. b.) and (C. e.) *pl.* 15. *Kitch. Courts*, 122. a. *Cro. Jac.* 31. *pl.* 1. Auncelme *v.* Auncelme. 3 *Lev.* 308. Barnes *v.* Corke.

(*h*) *Ante*, p. 4. and *poſt.* ch. 3. ſect. 2. p. 122.

(*i*) See *Gilb. Ten. Co. Litt.* &c. under Attornment. And ſee the ſtatutes 4 & 5 *Ann.* c. 16. and 11 Geo. II. c. 19.

Equitable relations.

In the case also of EQUITABLE relations; if the ancestor executes articles of purchase, and dies before such purchase be completed, A COURT OF EQUITY will compel such completion in favour of the heir of the purchaser; the vendor being considered as a trustee for the vendee; and the estate shall, IN THE CONTEMPLATION OF SUCH COURT, be deemed in such purchaser from the time of the execution of [23] the articles, so as to be capable of being devised by such ancestor, or inheritable by his heir (*k*).

c. 19. and *Co. Litt.* 309. a. note (1), (Harg. & Butl. edit.) and *Doug.* 283.

(*k*) *Preced. Chanc.* 320. Greenhill *v.* Greenhill & *al.* 1 *Vesey*, 437. Potter *v.* Potter. 2 *Ves.* 631. Hinton *v.* Hinton. *Shep. Touchst.* 429, note (2), (edit. of 1791.) 2 *Pr. Wms.* 629. Langford *v.* Pitt. 1 *Atk.* 572. Green *v.* Smith.

But we must not confound these equitable interests with estates at common-law; for such an interest as mentioned above is incapable of an actual seisin. It is stated from its analogy to the cases preceding it, and not as furnishing a rule for common-law estates. For on the completion of the agreement *by conveyance to the heir*, such heir would undoubtedly take by *purchase* at common-law; however, he may be considered as being *in* by a court of equity. See *post.* c. 5. and *Dougl.* 771. Goodright *d.* Alston *v.* Wells & *al.*

 Thus,

Actual ſeiſin neceſſary on a deſcent.

Thus, in caſe the anceſtor takes BY PURCHASE, he may be capable of tranſmitting the property ſo taken to his own heirs, without any actual poſſeſsion in himſelf; but if the anceſtor himſelf takes BY DESCENT, it is abſolutely neceſſary, in order to make him the ſtock or *terminus* from whom the deſcent ſhould now run, and ſo enable him to tranſmit ſuch hereditaments to *his own* heirs, that he acquire an ACTUAL SEISIN of ſuch as are corporeal, or what is equivalent thereto in ſuch as are incorpo-
[24] real (*l*); or that he exert ſome act of ownerſhip

(*l*) See 2 *Bla. Comm.* 209. ch. 14. *Gilb. Ten.* 12. *Co. Litt.* 11. b. 15. a. 40. a. 239. b. *Hale's Hiſt. of the Comm. Law*, 267. ch. 11. *Wright's Tenures*, 183. and note (9), ch. 3. 3 *Rep.* 41. b. 42. a. & b. Ratcliff's caſe. 8 *Rep.* 36. a. in Pain's caſe. *Noy's Maxims*, 22—3. ch. 4. *Kitchen of Courts*, 109. See 3 *Wilſon*, 526. Newman *v.* Newman. But note: though it be neceſſary that the anceſtor *be ſeiſed*, yet it is by no means required that ſuch ſeiſin continue till the death of ſuch anceſtor: for if he had been ſeiſed at any time during his life, and afterwards diſſeiſed, ſtill, if he had not parted with his right or property, his heir ſhall inherit. See *poſt.* ſ. 3. See *Coke on Fines*, Read. 19. *Tracts*, 270. *Co. Litt.* 237. b. And note, if a ſeiſin be pleaded, it ſhall be intended a *dying ſeized.* See 4 *Leon.* 97. Paſton *v.* Townſend.

ownerſhip over ſuch as are in reverſion or remainder expectant upon an eſtate of freehold (*m*).

For though the heir of the perſon to whom the fine *ſur cogn. de droit tantum*, &c. was levied, or to whom the ſurrender was made: though the heir of the party to the exchange who died before entry, of the deviſee, of the remainder-man, or of the purchaſer, ſhall ſucceed to the hereditaments of their reſpective anceſtors *by* [25] *deſcent*, though thoſe anceſtors had never had any *actual* ſeiſin; yet, in order to enable *them* to turn the deſcent, and tranſmit ſuch hereditaments to *their own* heirs, it is indiſpenſably neceſſary that ſuch perſons, who ſo ſucceed BY DESCENT, gain an ACTUAL POSSESSION, or what is equivalent thereto, in the reſpective premiſes; otherwiſe they ſhall deſcend, not to *their* heirs, (as ſuch,) but to thoſe who ſhall be able to ſhew themſelves the right heirs of ſuch firſt purchaſer; without any regard to any intermediate perſon who was never

(*m*) See *poſt.* ch. 3. ſec. 1.

 in

in the actual poſſeſsion of ſuch heredita-ments.

Seiſin in law; Immediately on the death of the anceſ-tor, (whether ſuch anceſtor had taken by deſcent or by purchaſe,) or the intermedi-ate perſon to whom the eſtate devolved, (whether ſuch perſon had an actual ſeiſin or not,) the law caſts the eſtate upon the heir (*n*): And as he has thus the right, it gives him alſo a preſumed poſſeſsion or

[26] ſeiſin; (for I ſpeak now of eſtates in poſ-

Or preſump-tive ſeiſin. ſeſsion). On the death of the anceſtor, as the poſſeſsion would be otherwiſe vacant, the law ſuppoſes or preſumes it to be in the heir; and this preſumptive poſſeſsion or

(*n*) See 2 *Bla. Comm.* 201. ch. 14. 3 *Ibid.* 168. ch. 10. *Co. Litt.* 15. b. 237. a. and b. See 4 *Co.* 58. a. and b. Caſe of Sadlers. *Gilb. Ten.* 18. See alſo *Carthew*, 260. Symonds *v.* Cudmore. and 3 *Wilſ.* 526. Newman *v.* Newman.

And ſuch heir immediately becomes tenant to the lord: inaſmuch, that if he die before entry, yet a *relief* ſhall be paid on his death. See *Kitch.* 146. a. *Fitzh. Abr. Relief.* 12. and 2 *Com. Dig.* 402. Copyh. (K. 11.) *Co. Litt.* 239. b. note (1). See *Gilb. Ten.* 24. and *Watk.* N. xxiii. p. 372. and N. xxiv. p. 377. *Brooke*, *Relief*, 2.

ſeiſin

ſeiſin is what is termed a poſſeſsion or ſeiſin IN LAW.

And we muſt be careful to remark, that this poſſeſsion or ſeiſin *in law* in the heir, is, as we have ſtated it, no more than *ſuppoſed* or *preſumed*; for if there be an *actual* poſſeſsion or ſeiſin, either by right or by wrong, in any other perſon, ſuch actual poſſeſsion or ſeiſin *rebuts* the preſumption of a ſeiſin in the heir (*o*).

Actual ſeiſin, though by wrong, rebuts the preſumption.

[27]

If, on the death of ſuch anceſtor, the hereditaments deſcending were IN LEASE FOR YEARS to any, then the poſſeſsion of the leſſee for years gives, not a ſeiſin or poſſeſsion *in law*, but a ſeiſin or poſſeſsion IN DEED to ſuch heir (*p*).

Seiſin in deed.

Leſſee for years.

(*o*) See *Gilb. Ten.* 22. 4 *Rep.* 58. a. and b. *Co. Litt.* 266. b. note (1), 277. a. *Brooke*, tit. *Dower*, 66. 75. *Seiſin*, 13. See *Plowd.* 137. b. 3 *Bacon's Abr.* Leaſe, (I. 5.)

(*p*) See the next ſection; and ch. 3. ſ. 1.

And the reverſioner may, in pleading, ſay, that he was ſeiſed *in his demeſne*. See *Plowden*, 191. and *Co. Litt.* 15. a. and note (3).

Tenant of the freehold.

If ſuch hereditaments were leaſed or limited FOR LIFE, OR IN TAIL, ſo that an eſtate of FREEHOLD was created, then the ſeiſin or poſſeſsion IN DEED *is in ſuch* PARTICULAR TENANT (*q*). And though a perſon is ſaid to be *ſeiſed* of ſuch reverſion or remainder thus expectant upon an eſtate of freehold, and ſuch ſeiſin is often ſtyled a ſeiſin in law; and ſo a ſeiſin in deed and a ſeiſin in law be ſuppoſed to exiſt together of the ſame eſtate; yet this confuſion ſeems to have ariſen from the different acceptations in which the word ſeiſin has been taken; and from uſing it in a general ſenſe, when it ſhould be taken in a ſtrict or confined one; or in a confined one, when it ſhould be uſed in a general ſenſe.

No ſeiſin of reverſion,&c. on a freehold.

By the ſeiſin of ſuch reverſioner or remainder-man is meant, in reality, no more than that ſuch reverſioner continues, or that ſuch remainder-man is placed, in the tenancy, and that the property is fixed in him. The particular eſtates and the reverſion or remainders over form, in law,

(*q*) See *poſt* ch. 3. ſec. 1.

but

but *one estate*; and, consequently, by delivering the possession to the person first taking, it extends to all. All, therefore, may be said to be *seized*; as they are all placed in the tenancy, and as the property is fixed in all.

If the tenant for life surrender to him immediately in remainder, and the remainder-man agree to such surrender, the frank-tenement is immediately in him, and a *præcipe quod reddat* lies against him before entry; but before entry he shall not have trespass (*r*).

But, on the other hand, when the seisin is divided into a seisin in deed and a seisin in law, we confine it merely to the *present corporeal possession* of the premises; not extending it to the fixture of an interest which is to come into actual enjoyment on a future event. The seisin, not strictly in its technical sense, but in its primitive and vulgar acceptation, *i. e.* the corporeal or visible possession, must, in the last case,

(*r*) *Bro. Surrender, pl.* 50.

be

be really expectant upon, and poſtponed to, the determination of the particular eſtate. And in this ſenſe the reverſioner or remainder-man cannot be ſeized either in deed or in law.

Words frequently convey an idea in one age very different from that which they were deſigned to excite in another. The *thing* is often forgotten, while the term remains. The uſage and cuſtoms vary; they dwindle into mere form, or they die of a gradual decay; while the word continues in its original ſtate. Thus the term *veſture* has experienced a ſimilar mutation with that of ſeiſin, and is, as frequently, extended to things to which it was not intended to apply. We now ſay that a remainder is *veſted*, as we ſay that the remainder-man is ſeized. We have ſeen that the term ſeizure is thus applied in a peculiar ſenſe—in a ſenſe in which it was not originally deſigned to apply; and when we ſay that ſuch remainder is *veſted*, we mend the matter but little; we only mean, that the property is fixed in him and not contingent.

The term veſted is alluſive to the improper inveſtiture of antiquity, which required a ſubſequent actual ſeiſin to complete it; and it is ſo uſed, from the analogy ſuch fixture of property in the remainder-man bears to that of the perſon ſo inveſted, and not from any abſolute propriety of expreſsion. Thus, improper inveſtiture appears to have been an inchoate form of delivering ſeiſin, and required, as we have ſaid, an actual livery to complete the transfer; and to have ariſen from a particular mode of ſuch livery—that of *inveſting* the tenant, or *clothing him with a robe or veſt* (*ſ*). The veſting, therefore, of an eſtate was originally and properly applicable to that of the particular tenant (or tenant in poſſeſsion) to whom the actual ſeiſin was given, ſince it was clearly no other than a ſymbolical livery.

When we ſpeak, then, of a ſeiſin in deed, or in law, it is alluſive to the actual

(*ſ*) See *Sullivan.* L. vi. p. 59. &c. 2 *Bl. Com.* c. 22. p. 366. *Kaims's Law Tracts*, Tr. iii. p. 106—8. *Robins. Gavelk.* B. 2. c. 2. p. 172. 1 *Burr.* 109. 1 *Watk. on Copyh.* 260.

poſſeſsion

possession of the premises; and not with reference to the interest of the reversioner or remainder-man, or their being placed in the tenancy.

Again; the great distinction between such reversion or remainder expectant upon a freehold, and an estate of which a person may have a seisin in deed or in law, or to which he has only a right, is this: The person *in the corporeal possession of the freehold*, who is in the perception of the profits, who has the *actual* possession, has *the seisin in* DEED: the person who has a right of property in the premises, and also a title to enter *immediately into them when the possession is* VACANT, has a *seisin in* LAW. In the former case, *the possession is already full, and, therefore, excludes a presumption*; but in the latter, it being *vacant, the law presumes it to be in him who has right*. But *if the actual possession be in one person, and another has a title to enter during such possession, he has but a right*; by reason of the actual possession being in such person.
[28] son. But, in the case of a reversioner or remainder-man, his title to enter does not arise

arife *till* AFTER *the poffefsion of a rightful* (*t*) *tenant is* EXPIRED, and not while [29] the poffefsion is in any one elfe. During the particular eftate, the poffefsion is in the particular tenant; but it is not till his poffefsion BE DETERMINED that the reverfioner's title to enter accrues. Now when his intereft is determined, the law fuppofes the premifes to be vacant; (for if Deforcement. the particular tenant continues the poffeffion after the eftate ended, it would be a deforcement of the reverfioner; which being a wrong in the tenant, the law will not prefume:) and upon the determination, therefore, of the particular eftate, does the title of entry of the reverfioner arife; and the poffefsion being thus fuppofed vacant, the law prefumes it to be in him who has title to enter: and thus has he a feifin in law; for fo is his feifin

(*t*) For though the reverfioner, &c. may enter on him who *intrudes* on the death of the particular tenant, and fo acquires the *wrongful* poffeffion; yet, on the expiration of the eftate of the tenant, his intereft ceafes to be a reverfion or remainder, and therefore not within our affertion.

now, and now very properly, called (*u*). But then this ſeiſin in law is never in the reverſioner or remainder-man *as ſuch*; for as ſoon as the particular eſtate is deter-
[30] mined, it ceaſes to be a reverſion or remainder, and becomes an eſtate IN POSSESSION (*x*): and, conſequently, a remainder-man or reverſioner cannot ſtrictly be ſaid to be ſeiſed *as ſuch*, though it is ſo ſaid in common parlance. And though it *is* ſo ſaid, (that he has a ſeiſin in law, even during the continuance of the particular eſtate,) yet this ideal ſeiſin is not put upon a level with the ſtrict legal ſeiſin in the perſon entitled, when the poſſeſsion is abſolutely vacant: for notwithſtanding it appears, that of a ſeiſin in law a widow may have her dower, yet ſhe ſhall not have dower of the ſeiſin we now mention; but ſhall wait for that ſtrict ſeiſin in law which takes place on the *determination* of the particular eſtate, in order not only to be endowed, but even to be endowable (*y*).

No dower of a reverſion on a freehold.

(*u*) *Plowd.* 29.
(*x*) *Plowd.* 153—155.
(*y*) See *poſt.* ch. 3. ſec. 1.

But to return: If, on the death of the ancestor, a stranger enters before the heir, and, in legal language, ABATES, then the actual possession of the abator, though by wrong, shall rebut the seisin or possession in law of the heir (*z*). So, had the ancestor himself been DISSEISED, and died before a subsequent entry, the actual seisin would be in such disseisee, and the heir have but a right (*a*). Abator. [31]

But when hereditaments descend, and a stranger abates, yet, though the heir has but A RIGHT remaining, he may release it to such abator (*b*). So, also, if such hereditaments be copyhold, and another be Release of right by the heir. By a Copyholder.

(*z*) *Brooke*, *Dower*, 66. 75. *Seisin*. 13. *Co. Litt.* 277. a. *Plowd.* 137. b. 3 *Bac. Abr.* 400, 401. Lease, &c. (I. 5.) *Ante*, p. 26. (*g*).

(*a*) This is implied in the very term *disseisin*. And see *Perkins*, sec. 280. and 1 *Burrow*, 106. Taylor *d.* Atkins *v.* Horde, and *post*. sec. 3. *Gilb. Ten.* 48. *Hob.* 322. Elvis *v.* Archbishop of York, & *al.*

(*b*) *Brooke*, *Descent*, 27. See *Litt.* sec. 448. *Co. Litt.* 275. 266. a. and b. 5 *Com. Dig.* 370. Release, (B. 2.) *Touchst.* 321. 331. 10 *Co.* 48. Lampett's case.

wrongfully

wrongfully admitted, the heir may releaſe [32] to the perſon ſo admitted tenant (*c*). So, By tenant in gavelkind. alſo, an infant of fifteen may releaſe his gavelkind lands to one in poſſeſsion of the freehold (*d*), &c. &c. But though the A right not grantable. right of the heir may be thus releaſed *to the perſon in poſſeſsion*, yet it *cannot* be given or granted *to any other*, it not being in its nature grantable(*e*).

(*c*) *Co. Litt.* 59. a. and note (2), 60. a. 4 *Rep.* 25. Kite & Quienton. See *F. N. B.* 98. A. See further 2 *Com. Dig.* 395. Copyh. (I. 1.) 6 *Viner's Abr.* 74. Copyh. (Z. a.) *Co. Copyh.* ſec. 36.

And note; that the releaſe of a copyholder can only operate *by way of extinguiſhment*. See *Watk.* N. lxix. to *Gilb. Ten.* 410—11.

So the perſon having right may enter, notwithſtanding the admiſſion of the perſon who is become tenant by wrong. See *Watk. Gilb.* 191. N. (m.) 457. N. cxxix.

(*d*) See *Robinſ. of Gavelk.* b. 2. c. 3. p. 197.

(*e*) *Co. Litt.* 214. a. 265. a. & N. 266. a. 267. a. 10 *Co.* 48. a. Lampett's caſe. *Perkins*, ſec. 280. &c. *Touchſt.* 231.

But if the releaſee have only a poſſeſſion *in law*, it will be ſufficient. See *Litt.* S. 447. *Gilb. Ten.* 49. *Co. Litt.* 265. a. N. (1).

If

If the heir has ſuch right together with *a ſeiſin* IN LAW, his widow may claim her dower, though he die before entry (*f*); and though that ſeiſin in law abide in him but for a ſingle moment (*g*). As where lands deſcend to an heir *who is married at the time of the deſcent caſt*, and a ſtranger abates on the death of the anceſtor, and, during the poſſeſsion of the ſtranger, the heir dies, his widow ſhall be endowed (*h*). For as the law, immediately on the death of the anceſtor, caſts the eſtate on the heir (*i*), and as the ſtranger cannot abate till *after* the death of the anceſtor, (for had he entered *before*, he would not have been Dower of a ſeiſin in law. [33] Abator. [34]

(*f*) *Litt.* ſ. 448. 681. *Co. Litt.* 31. a. 266. b. 358. b. *F. N. B.* 149. D. *Doct. and Stud.* dial. ii. ch. 15. *Perk.* ſec. 304. *Brooke, Dower*, 66. 75. *Fitz. Ab. Dower*, *pl.* 15.

(*g*) 2 *Bla. Comm.* 132. ch. 8. *Cro. Eliz.* 503. Broughton *v.* Randall. *Bull. N. P.* 118. *Fitz. Abr. Dower*, 34. 42.

(*h*) See *Perk.* ſec. 371—2. *Gilb. Ten.* 31. See alſo *Preſton on Eſtates*, 546. ch. 7.; and *Brooke*, tit. *Dower*, 75.

(*i*) See *Gilb. Ten.* 31. 2 *Blackſt. Comm.* 132. ch. 8. *Litt.* ſec. 448. *Ante*, p. 25. (*f*).

the abator of the heir, but the diffeifor of the anceftor,) the feifin, in contemplation of law, is in fuch heir *before* the abatement of the ftranger. For fuppofing that
[35] the ftranger had entered the very inftant that the anceftor died, yet, as the poffeffion was neceffarily *vacant* before he could have abated, the poffefsion during fuch vacancy, was prefumed by the law to have
Inftant. been in the heir: and the law frequently permits an inftant to be cleft afunder; for it tells us, that "in things of an inftant there is A PRIORITY OF TIME; and the one fhall be faid to *precede* the other, although both fhall be faid to happen *at one inftant*; for every inftant, fays the law, contains the end of one time and the commencement of another," &c. (*k*). But we muft not forget, that though it thus cleaves an inftant into *two* parts, it gravely informs us that it does not carry its pretenfions fo far as to be able to carve it into *three* (*l*).

(*k*) See *Co. Litt.* 185. b. 298. a. 1 *Co.* 76. b. 174. b. *Plowd.* 258.

(*l*) See 6 *Co.* 33. a. b.

But

But if the heir had *not* been married at the time of the descent cast, and a stranger had abated, and *afterwards* the heir had married, and died before a subsequent seisin, his wife should *not* be endowed. For, by the entry of the stranger, his seisin in law is *rebutted*; and, therefore, as he has no seisin either in deed or law, (and seised he must be, says Sir Edward Coke (*m*), either the one way or the other, during the coverture,) he has only *a right* remaining in him. And as a seisin, either in deed or in law, is thus essential to give title of dower to the widow, and as the heir has now neither of those seisins, by consequence his widow cannot be dowable (*n*): as a widow can no more have dower of a right (*o*), than an husband can have his curtesy (*p*)

Seisin rebutted.

[36]

No dower or curtesy of a right.

There

(*m*) *On Litt.* 31. a. and see *Perk.* sec. 366.

(*n*) See *ante*, p. 26. 30. *Brooke*, *Dower*, 66. 75. *Lease*, 57. *Seisin*, 13. *Co. Litt.* 277. a. *Plowd.* 137. b. *Perk.* sec. 367.

(*o*) Note an error in *Wood's Inst.* b. 2. ch. 1. s. 5. p. 123. (edit. of 1738.) where it is said, that the widow shall be endowed where the husband has only *a* right.

[37] There muſt be a ſeiſin in deed or in law in the huſband during the coverture to entitle the widow to dower; and therefore, as in the caſe immediately before put, if the ſtranger had entered *before* the marri-

right. He ſeems to cite 1 *Inſt.* 31. a. and b. in ſupport of ſuch aſſertion. But Lord Coke, neither there, nor elſewhere that I can find, ſays that ſhe ſhall be endowed of a right. Indeed, in the very place referred to, he ſays poſitively, (as quoted as above,) that the huſband muſt be *ſeiſed*, either in deed or in law, during the coverture; and, therefore, in effect, directly contradicts ſuch poſition: for to ſay that a perſon can be SEISED *even* IN LAW, *of* A RIGHT, is a contradiction in terms.

In the very next page to that now quoted, *Wood* tells us from the ſame author, (1 *Inſt.* 32. a.) that the widow ſhall not be endowed of a reverſion on an eſtate for life, "BECAUSE *the huſband had neither a ſeiſin in deed or in law*." Now if this be a reaſon why ſhe ſhall not be endowed of ſuch reverſion, it will be a reaſon alſo why ſhe ſhall not be endowed of ſuch right; ſince of *that* alſo, "*the huſband had neither a ſeiſin in deed or in law*." But *Wood*'s opinion alone is not authority; "though (as C. J. *Reeves* obſerves) he generally quotes very fair." See C. J. *Reeves's Inſtructions for the Study of the Law*, in the COLLECTANEA JURIDICA, vol. i. p. 80.

(*p*) See *Perkins*, ſ. 457. *Co. Litt.* 29. a. and 2 *Co.* 59. b.

age

age of the heir, and the heir had died during the abatement, his wife could not be entitled to dower, because the heir had no seisin during the coverture. So had the heir entered on the death of his ancestor, and gained an actual seisin, and [38] then, during his celibacy, had been *disseised*; and, *after such disseisin*, had married, and died before a subsequent recovery of seisin, his widow should *not* be endowed (*q*). But had he, in the first case, been married at the time of the descent, and so had a seisin in law during the coverture; or had he had an actual seisin *after marriage*, and then been disseised (*r*), or had aliened his lands (*s*), his widow would be certainly dowable (*t*).

But

(*q*) *Perk.* sec. 366. Nor should the husband, in such case, have *his curtesy*, *Perk.* s. 458.

(*r*) *F. N. B.* 147. (E.) *So of curtesy. Perk.* s. 472. and *Co. Litt.* 30. a.

(*s*) *Co. Litt.* 32. a. *F. N. B.* 147. (E.)

(*t*) For it is not necessary that the seisin continue during the whole of the coverture: for though the dissolution of the marriage will destroy dower, yet the discontinuance of seisin will not. See *Co. Litt.* 32. a. and

No curtesy of a seisin in law.

But if the hereditaments descend to a daughter or other heiress, and such heiress *has* a seisin in law unrebutted by another

[39]

seisin, yet such seisin in law will *not* intitle her husband to THE CURTESY (*u*); unless

Exception.

it be in special cases, as of rents, advowsons, &c. where the wife dies *before* the rent becomes payable, or the advowson void; and this only from the necessity of the case (*x*).

If

and b. (But as to *free-bench of copyholds*, the customs generally require *a dying seised* either in deed or in law. See *Co. Litt.* 239. b. *Carth.* 275. Benson *v.* Scott. 2 *Vef.* 633. Hinton *v.* Hinton. 2 *Atk.* 526. Godwin *v.* Winsmore. *Cowp.* 481. Salisbury *d.* Cooke *v.* Hurd. 2 *Watk. Copyh.* ch. 3. p. 73. But note; a dying seised is not essential to entitle a widow to dower of lands in gavelkind, according to the custom of Kent. See *Robins. Gavelk.* b. 2. c. 2. p. 172—3.

(*u*) *Co. Litt.* 29. a. and n. (3). 40. a. 2 *Blackst. Comm.* 127. ch. 8. 8 *Rep.* 34. b. 36. a. Paine's case. *F. N. B.* 143, (O.) 149. (D.) 1 *Co.* 97. b. *Doct. and Stud.* b. 1. ch. 7. and b. 2. ch. 15. *Perk. Ten. p. le Curtesie*, s. 457. 458. 464. 470. *Brooke Ten. p. le Curtesie*, 7 and 13. *Dower*, 75. *Kitch. Courts*, 159. b. *Finche's L.* b. 2. ch. 3. p. 129. See 3 *Atkins*, 469. De Grey & *al.* *v.* Richardson & *al.* and 1 *Vesey*, 307. Hearle *v.* Greenbank.

(*x*) *F. N. B.* 149. (D.) *Co. Litt.* 29. a. and n. (5.) *Perk.* s. 468. &c. 2 *Siderfin.* 110. 117. Dethick *v.* Bradburne.

If lands descend to the heir, they shall be ASSETS in his hands BEFORE ENTRY (*y*). Assets before entry.

So a seisin *in law* only is sufficient to AVOW upon (*z*); but in order to maintain ASSIZE, or any ANCESTRAL WRIT, an ACTUAL SEISIN is necessary (*a*). But *the heir*, who has had only a seisin in law (*b*), or no seisin at all in himself, may maintain a writ of right, and allege an actual seisin in his ancestor (*c*). Avowance. [40] Writ of right, &c. Esplees.

v. Bradburne. *Brooke, Ten. p. le Curtesie*, 5. 9. *Doct. and Stud.* b. 2. ch. 15. *Kitch.* 159. b. 1 *Co.* 97. b. 2 *Comm.* 127. c. 8. See *Preston on Estates*, 484—9. and *Bacon's Abr.* tit. *Curtesy of Eng.* (C.) sec. 2. *pl.* 2.

(*y*) *Brooke, Assets p. Desc.* 8. 1 *Com. Dig.* 422. (Assets, A.) 3 *Vin. Abr.* (Assets, A.) *pl.* 3. *Dalton's Sheriff*, 126. ch. 26.

(*z*) See 4 *Co.* 9. 10. in Bevil's case.

(*a*) See 4 *Co.* 9. 10. *Litt.* s. 681. And see *Com. Dig.* Assize (B. 5.) Seisin, (C.) and *Viner*, tit. Assize.

(*b*) So a *præcipe quod reddat* will lie *against him* on a *seisin in law*. *Bro. Seisin*, 13. *Præcipe quod reddat.* 5. & 38. *Siderfin.* 58. Wheeler *v.* Honour. 3 *Co.* 26.

(*c*) See *F. N. B.* 3 *Blackst. Comm.* &c. &c. of writ of right.

Alleging of ſeiſin by the heir. But this privilege of alleging a ſeiſin in the anceſtor is peculiar to AN HEIR, or one who takes BY DESCENT (*d*): As in maintaining a writ of right, an ACTUAL (Eſplees.) SEISIN, by taking eſplees, is neceſſary to be alleged; and as the heir, in the caſe now under conſideration, has not ſuch ſeiſin in himſelf before entry, the law allows him to take advantage of, and plead, By a purchaſer. the ſeiſin of his anceſtor. But as a purchaſer takes immediately by his own act, he can have no ſuch anceſtor in whom to allege ſuch ſeiſin; for the alleging of ſuch [41] ſeiſin is confined to AN ANCESTOR, and has nothing to do with a FEOFFOR, DONOR, &c. Such purchaſer, therefore, in order to maintain ſuch writ, muſt count upon HIS OWN *actual ſeiſin*; and if he has had no actual ſeiſin, he cannot maintain it. So if an eſtate be deviſed to A. for life, Remainder. with remainder to B. in fee, and B. die in the life-time of A.: here the remainder being veſted in intereſt in B. his heir ſhall inherit, and take it when it falls: but the

(*d*) See *Co. Litt.* 293. a. 1 *Blackſt. Term Rep.* C. B. *Eaſt.* 28 *Geo.* 3. 1—6. Dally *v.* King.

remainder-

remainder-man cannot maintain a writ of right during the continuance of a prior estate of freehold in possession (*e*), having then only an estate IN REMAINDER: but the method by which he must recover is by A FORMEDON (*f*); and in bringing which, it is necessary that he allege esplees in the particular tenant (*g*). Formedon.

But although the estate descending to the heir be sufficiently vested in him before his own actual entry or seisin, as to the purposes already mentioned, yet it is absolutely and indispensably requisite that he be ACTUALLY SEISED of the hereditaments so descended, in order to make HIMSELF the stock of descent or TERMI- Actual seisin. [42]

(*e*) Nor *after* the determination of that estate till he gain an *actual* seisin by entry, or otherwise. *F. N. B.* 217. b.

(*f*) See *Fitzherbert's Nat. Brev.* 217. *Form. en Remaind.* 3 *Blackst. Comm.* 191. ch. 10.

(*g*) See *Dyer*, 140. *pl.* 41. *Brooke*, *Esplees*, 1. 3. 10. *Hale on F. N. B.* 200. (B.) note (*a*), page 463. and 214. (A.) note (*c*), p. 492. and 6 *Co.* 3. Markall's case, and *Kitch.* 126. b.

NUS

NUS (*h*), and make ſuch hereditaments tranſmiſsible *to* HIS OWN *heirs*. For if he die BEFORE ENTRY OR OTHER ACTUAL SEISIN OR POSSESSION OBTAINED, the brother of the HALF BLOOD ſhall ſucceed to the inheritance, in excluſion of the ſiſter of the whole (*i*): as the perſon now claiming muſt make himſelf heir to him who was LAST ACTUALLY SEISED by entry, receipt of rent, preſentation to advowſon, &c. or to THE ORIGINAL PURCHASER, or MESNE GRANTOR, as the caſe may require.

(*h*) See *ante*, p. 25.

(*i*) *Non Jus, ſed ſeiſina facit ſtipitem.* See 2 *Bl. Comm.* 312. ch. 20. who refers to *Fleta. lib.* 6. *c.* 2. *ſ.* 2. and ſee *Bract. lib.* 2. *c.* 30. *f.* 65. *b. Hale's Com. Law*, ch. 11. p. 267. and ſee *Ibid.* 261. (*fourth* edit.) 2 *Blackſt. Comm.* 228. ch. 14. & 312. ch. 20. *Litt.* ſ. 8. *Co. Litt.* 14, 15. &c. *Brooke, Deſcent*, 27. & 51. *Jenk. Cent.* 242. *pl.* 25. *Carth.* 87—8.

SECT. II.

How an actual Seisin may be obtained. [43]

Obtaining an actual seisin on a descent.

In the preceding section we have observed that anceſtors, from whom an inheritance can be derived, may be divided into thoſe who have taken by purchaſe, and thoſe who have themſelves ſucceeded by deſcent to the hereditaments claimed; and as to thoſe who have taken by purchaſe, that the *fixing* of the property in the premiſes conveyed in the perſon ſo taking, is ſufficient to render them tranſmiſsible to the right heirs of the perſon in whom the property is ſo fixed. When a perſon, therefore, claims by deſcent from ſuch FIRST PURCHASER, he need only allege SUCH FIXTURE OF PROPERTY; and is by no means obliged to ſhew an ACTUAL SEISIN in the perſon from whom he claims: but as the requiſites to ſuch fix-

ture of property are thus relative to A PURCHASE, and eſſential to its completion, I think it unneceſſary, and beſide the pur-
[44] port of theſe pages, to ſay any thing further on this head.

I ſhall, therefore, when ſpeaking OF THE MEANS OF OBTAINING AN ACTUAL SEISIN, confine myſelf merely (or at leaſt in general) to the means of obtaining ſuch ſeiſin ON A DESCENT: or, in other terms, of the means of acquiring ſuch ſeiſin by a perſon who himſelf takes by deſcent, as to enable him to tranſmit the hereditaments deſcending *to* HIS OWN *right heirs.*

By entry. The moſt common and direct method, then, of obtaining AN ACTUAL SEISIN, when hereditaments DESCEND to a perſon, and ſuch hereditaments are of a corporeal nature, is to make AN ACTUAL ENTRY in the lands ſo deſcended: but as the manner of making ſuch entry is ſo generally underſtood, and already ſo plainly ſet forth, and as the intent of the following ſheets is only to explain what is conceived to be obſcure, or to collect into a conciſe view what

what is ſcattered through the pages of prolixity; and not to tire the reader with the needleſs repetition of that which he may find better arranged and elucidated elſewhere; I ſhall content myſelf with juſt tracing the outlines of this doctrine, [45] and ſhall then refer to thoſe authors who have treated of it more at large.

When an anceſtor, therefore, dies, the Sufficient. What? heir is to enter actually in the lands; and ſuch entry may be into any part of ſuch lands, and by any part of the perſon, (as where one entering into an houſe by the window, and when half out and half in, was pulled out again by the heels, the entry was adjudged ſufficient (*a*)—). And ſuch entry ſhall give him AN ACTUAL SEISIN of all ſuch lands whereof ſuch anceſtor died ſeiſed, within the ſame county, and into which he had a right to enter at

(*a*) Et pur ceo qu'il ne purra entrer per le huis, il entra per le feneſtre, et quant l'un moitie de ſon corps fuit deins la meaſon & l'autre de hors, il fuit treit hors; per q. il port aſſiſe: & fuit agarde q. le plt. recovera. 8 *Aſſ. pl.* 25. f. 17. b. and vide *Brooke*, *Seiſ.* 20. and 23. and *Entre Cong.* 57. and 61.

4 the

the time of ſuch entry made, or which were in the poſſeſsion of the ſame abator: but entry into lands in one county, or into which he might then enter, or which were in the poſſeſsion of one abator, will not give him ſeiſin of lands in another county, or to [46] which his right of entry did not till afterwards accrue, or which were in the poſſeſsion of other abators (*b*).

Claim.

But however this entry be made, it muſt be peaceable, and not "with ſtrong hand." For if the heir cannot go peaceably on the lands, he may go as near to them as he ſafely may, and there make claim, which will amount to an actual entry (*b*).

(*b*) See further *Fitzh. Abr. Brooke. Littleton. Co. on Litt. Comyns's Dig. Viner's Abridgment. Gilb. Ten.* 3 *Com.* tit. Entry and Continual Claim; and *Co. Read. Fines*, Readings 15, 16, 17. *Tracts*, 263. 1 *Leon.* 265.

If two acres deſcend, and a ſtranger abate into one of them, the heir ſhould enter into both; or, at leaſt, into that acre in which the abatement was made, *in the name of both*; for if he ſhould enter into the other in the name of both, it might be doubtful whether it would ſuffice. See *Plowd. Quæries, qu.* 142.

But

But here it may not be improper to observe that it is not the mere act of going on the lands that will constitute a legal entry sufficient to vest the actual possession in the person who has right. Thus when the disseisor requested the disseisee to go into his cellar to see the antiquity of it, which he did; yet this was adjudged to have been no entry in the disseisee: so if the disseisor had asked the disseisee to go to the house whereof the disseisin was made, to his daughter's wedding, or to dine with him, or the like: So where the plaintiff went into the house to the jury on a view to shew evidence, it was adjudged *not* to have been an entry in him; but, in order to constitute a legal entry, the person so entering must enter with that intent (*c*), and express his intent to be such (*d*). For otherwise, where could be that notoriety of possession which the

Insufficient. What?

[47]

(*c*) See *Plowd. Comm* 92, 93. See also *Co. Litt.* 245. b. 368. a. 1 *Mod. Rep.* 10. Clerk *v.* Rowell & *al.* 6 *Mod.* 44. Ford *v.* Lord Grey.

(*d*) Or manifest such intention by some overt act. See *Robins. Law of Inherit.* ch. 4. p. 33. note (*i*), edit. 1755.

law

law so justly requires in cases of this nature? How could an accidental, or unintentional, or secret entry be any evidence to the neighbouring tenants of the right or possession of the persons so entering (*e*)?

By guardian or lord.

[48]

But it is not absolutely necessary that the possession be gained by the actual entry of the very person to whom the lands descend: It may be gained by the entry or possession of THE GUARDIAN or LORD OF THE INFANT HEIR (*f*); or by the possession

(*e*) See 2 *Bla. Comm.* 209. ch. 14. *Gilb. Ten.* 83. 118. and notes. See also *Kaims's Law Tracts*, ii. & iii. *Sullivan's Lect.* lect. 6. p. 58. *Dalrym. F. P.* 224. &c.

(*f*) *Fitzh. Abr. Desc.* 12. *Brooke*, tit. *Descent*, 19. *Entre Cong.* 37. *Seisin*, 18. *Dyer*, 291—2. *pl.* 69. *Co. Litt.* 15. a. and note (4). 29. a. and note (3). *Kitch. of Courts*, 110. a. 130. b. 131. a. &c. 3 *Co.* 42. a. 9 *Co.* 106. a. 1 *Comyns's Dig.* 433. Assize, (B. 4.) *Co. Compl. Copyh.* sec. 41. p. 95. *Tracts. Noy's Max.* 23. ch. 4. 2 *Inst.* 134. See further, 3 *Wils.* 516. Case of Newman *v.* Newman; and 3 *Viner's Abr.* Assize, (D.) *F. N. B.* 179. F.

And note; the guardian need not be formally assigned. See 3 *Wils.* 528. Newman *v.* Newman. 9 *Co.* 106. a.

So

ſeſsion of THE ANCESTOR'S LESSEE FOR YEARS, TENANT BY ELEGIT, STATUTE-MERCHANT, or STATUTE-STAPLE (*g*). And

Tenant of a chattel interest.

So if a ſtranger enter into the lands of an infant and take the profits, he ſhall be conſidered, both at law and in equity, as entering as guardian, and ſhall be accountable as ſuch. See *F. N. B.* 118. B. *Noy's Max.* 38. *Co. Litt.* 89. a. & b. *Sullivan*, lect. 13. p. 128—9. 1 *Atk.* 489. Morgan *v.* Morgan. and 3 *Atk.* 130. Dormer *v.* Forteſque.

And the entry of ſuch perſon will make a *poſſeſſio fratris* in the infant. See 7 *Durnf. & Eaſt.* 386. & 390. Doe *v.* Keen. 3 *Wilſ.* 516. &c. and *Preced. Chanc.* 280. Whitcombe *v.* Whitcombe.

(*g*) *Co. Litt.* 15. a. 243. a. 3 *Co.* 42. a. *Kitch.* 109. b. 1 *Vent.* 261. Batmore *v.* Graves. 1 *Comyns's Dig.* 433. Aſſize, (B. 4.) 5 *Ibid.* 443. Seiſin, (A. 2.) and (C.) 9 *Rep.* 105. b. Margaret Podger's caſe. *Gilb. Ten.* p. 158. *Co. Copyh.* ſ. 41. *Tracts*, 95. and *Supplem.* ſ. 5. p. 157—8. *Noy's Max.* 23. ch. 4. *Moore*, 125. *ca.* 272. *Brooke*, *Seiſin*, 18. 36. See 3 *Atk.* 469. De Grey & *al. v.* Richardſon & *al.* 3 *Wilſ.* 516—528. Newman *v.* Newman. *Jenk. Cent.* 242. *pl.* 25. See 2 *Inſt.* 688—9. 6 *Rep.* 57. b. *F. N. B.* 179. F.

And this, though the heir dies before the day of payment of rent. See the above references, and particularly *Moore*, 126. ca. 272. *Co. Litt.* 15. a. and 3 *Atk.* 469.

 But

[49] And as THE POSSESSION OF THE LESSEE FOR YEARS OR AT WILL IS THAT OF THE LESSOR (*h*), ſo it ſeems that the heir

Leaſe by the heir before entry.

But if the anceſtor had made a leaſe FOR LIFE, reſerving rent, and the heir receive the rent ſo reſerved; yet ſuch receipt will *not* make POSSESSIO FRATRIS in the heir of ſuch reverſion; it being upon an eſtate of FREEHOLD. See *Co. Litt.* 15. a. and note (5); and *poſt.* ch. 3. ſ. 1.

And note; If a common recovery be ſuffered of lands which are let on leaſes for years, the recoveror will not have the reverſion preſently by the judgment, (*i. e.* will not be in the actual poſſeſſion by reaſon of ſuch leaſes for years), but the recovery muſt be executed by writ, entry, or claim. 2 *Cruiſe*, 135. ch. 6. cites 1 *Co.* 94. b. 106. b. and ſee *Moore*, 137. 141. *pl.* 281. Shellie's caſe. See alſo 2 *Lord Raym.* 853. Weſt *v.* Sutton.

If a man recover an advowſon, and after the biſhop collate for lapſe, the ſame is an execution of the judgment, and will make a *poſſeſſio fratris*. *P. Moyle.* 22 *Hen.* 6. cited by Anderſon, C. J. 1 *Leon*, 234.

See further next note (*h*), and 3 *Viner*, Aſſize, (D).

(*h*) See before note (*g*), and *ante*, ſec. 1. p. 27. 1 *Com. Dig.* 433. Aſſize, (B. 4.) 5 *Ibid.* 443. Seiſin, (A. 2.) 6 *Ibid.* 298. Deſcent, (C. 9.) *Kitch.* 62. See 3 *Wilſ.* 516—28. *Buller's N. P.* 104. And ſee alſo 1 *Wilſ.* 176. and 6 *Co.* 57. a. 59. a. Brediman's caſe. *Co. Litt.* 290. b. note (1). 330. b. note (1).

So

heir may make ſuch leaſes for years or at will BEFORE HIS OWN ENTRY, and ſo acquire an actual ſeiſin by them; for it appears, upon the whole, pretty clear, that the poſſeſsion IN LAW ONLY of the heir is ſufficient to enable him to make ſuch leaſes, without any actual entry by himſelf; as where the lands deſcend to ſuch heir, and his poſſeſsion be *unrebutted* by [50]

So if a REMAINDER be limited on an eſtate for years, the poſſeſſion of the particular tenant is the poſſeſſion of the remainder-man. See (of *Freeholds*) *Litt.* ſec. 60. and *Co. Litt.* 49. a. and b. and 239. b. and note (2). 2 *Bla. Comm.* 167. ch. 11. And ſee alſo *poſt.* ch. 3. ſ. 1.; and *ante*, p. 21.

Of *Copyholds*, 2 *Levinz*, 107. 1 *Vent.* 260—1. Batmore *v.* Graves. 6 *Vin.* Copyh. (P. b.) (C. e.) *pl.* 15. 2 *Com. Dig.* 391. Copyh. (G. 9.) and *ante*, p. 21. note (*w*).

So the entry of A DEVISEE for YEARS will make POSSESSIO FRATRIS. See *Jenk. Cent.* 242. *pl.* 25. See it alſo in 7 *Vin Abr.* 585. Deſcent, (K). *pl.* 34. and 36. and in *Co. Litt.* 15. a. note (4). See alſo *Dyer*, 342. *pl.* 54. Towers *v.* Burrows. and *Brooke*, *Feoffm. al Uſes*, 33. and *Deſcent*, 36. *Fitzh. Abr. Subpœna*, 3. 3 *Leon.* 25. *ca.* 53.

Deviſe to executors to pay debts, they have a *chattel intereſt.* See 8 *Co.* 96. a. *Co. Litt.* 42. a. *Cro. Eliz.* 316. Cordal's caſe. 2 *Vern.* 403. Hilchins *v.* Hilchins.

 the

the actual ſeiſin of any other perſon: but if another *abates*, ſo as to *rebut* ſuch preſumed or legal ſeiſin, the heir having now neither a ſeiſin in law or deed, and, con-
[51] ſequently, no poſſeſsion at all, cannot poſsibly be able to make any leaſes of ſuch lands (*i*).

Tenant by copy.

ACTUAL SEISIN may alſo be gained by the poſſeſsion of A TENANT BY COPY OF COURT-ROLL, *whether ſuch tenant be for* YEARS, LIFE, OR IN FEE (*k*). For copyholds were originally, and yet are in the eye of the law, only tenancies at will; the freehold remaining in the lord (*l*): and of

(*i*) See *Noy's Max.* ch. 34. *Plowd.* 87. 137. 142. 5 *Com. Dig.* 443. Seiſin, (A. 2.) *Bacon's Abr.* Leaſe, (I. 5.) *Brooke*, *Leaſe*, 57. *Touchſt.* 269. 2 *Strange*, 1086. Berrington *v.* Parkhurſt & *al.* and ſee *Gilb. Ten.* 159—60.

See *poſt.* 57. a. N. (*ſ*), of an Entry by Attorney.

(*k*) See 9 *Rep.* 105. b. 106. a.

(*l*) See 3 *Levinz.* 94. See it alſo in 6 *Viner's Abr.* Copyh. (A.) *pl.* 9. *Gilb. Ten.* 160. 4 *Co.* 22. a. Brown's caſe. 23. b. Clarke *v.* Pennyfather. 2 *Inſt.* 325. *Co. Copyh.* ſec. 14. *Tracts*, 11. See 3 *Burr.* 1273—9. Stephenſon *v.* Hill.

See

of copyholds there may be a POSSESSIO [52]
FRATRIS before admiſsion (*m*).

Coparceners, &c.

So the entry of one COPARCENER. JOINT-TENANT, OF TENANT IN COMMON, is ſufficient to make POSSESSIO

See 1 *Blackſt. Tracts*, *Conſid. on Copy.* and 2 *Com.* 147. ch. 9. who ſays, that ſome copyholders have a freehold intereſt, but not a freehold tenure: (for if they had a freehold tenure, how could they be conſidered as copyholders?) But theſe are uſually denominated cuſtomary freeholders, and not merely copyhold tenants who hold "*at the will of the lord.*" See *Co. Litt.* 59. b. and note (1). 9 *Co.* 76. b. Combe's caſe. *Carth.* 432. Gale *v.* Noble. 3 *Salk.* 100. Page *v.* Smith. and in *Dig. Ca.* K. B. 433. Eſtates. 2 *Lord Raym.* 1225. 1232. Crowther *v.* Oldfield. And ſee 3 *Burr.* 1273—8. Stephenſon *v.* Hill, where it is ſaid, that the freehold, even of theſe eſtates, is in the lord of whom held. See alſo *Calth. Read.* 51. 54. edit. 1635.

(*m*) *Dyer*, 291. *pl.* 69. *Lex Cuſtumaria*, ch. 17. p. 154—6. *Cro. Car.* 411. Reeve *v.* Malſter. 4 *Co.* 22. b. Brown's caſe. 23. b. Clarke *v.* Pennyfather. *Gilb. Ten.* 159. 2 *Com. Dig.* 379. Copyh. (D. 1.) 388. (G. 1.) 6 *Vin. Abr.* Copyh. (D. b.) and (C. e.) *Co. Copyh.* ſ. 41. *Tracts*, 94. (ſee it.) *Supplem.* ſ. 5. p. 157. *Kitch. Courts*, 60. a. 81. b. *Moore*, 125—6. *ca.* 272. *Calth.* 64. 87—8.

For it is the entry and not the admittance which makes a *poſſeſſio fratris* of copyholds. See 1 *Freem.* 45. Foxe *v.* Smith. and *poſt.* p. 63. N.

[53] FRATRIS in the others who did not enter, to the excluſion of the half-blood (*n*). So the

(*n*) *Hob*. 120. Smales and Dale. *Moore*, 868. *pl.* 1201. S. C. and ſee *Moore*, 546. *ca.* 729. Hemley *v.* Brice. See alſo *Dyer*, 128. *pl.* 58. Ballard *v.* Ballard. Who *quæries*, "*Si l'entre del eigne Fitz, (en Gavelkinde Terre) done ſeiſin a les autres ou nemy? Quod* (he adds) *eſt difficile a l'eſtranger, ut credo.*" And ſee *Robinſ. on Gavelk.* b. 1. c. 6. p. 113. who obſerves on this caſe in *Dyer*, that the ſtranger holds in common with the heirs, and muſt plead and be impleaded by a ſeveral *præcipe:* And it is a general rule, he adds, that, where there are ſeveral aćtions, there muſt be ſeveral entries, and, therefore, the entry of the heir will not give ſeiſin to a ſtranger. But *quære* as to this: For, though all tenants in common muſt be impleaded by ſeveral *præcipes*, (*Co. Litt.* 195. b.) yet it appears, from the caſes cited from *Moore* and *Hobart*, that where the heir and deviſee were tenants in common, the one by deſcent, and the other by purchaſe, the entry of one alone cauſed a *poſſeſſio fratris* in the other.

See further 1 *Lord Raym.* 622. Fiſher & Wigg. *Co. Litt.* 373. b. 5 *Burr.* 2607. Fairclaim *d.* Empſon *v.* Shackleton. *Jenk. Cent.* 42. *pl.* 79.

If there are ſeveral coparceners, and one only preſent to an advowſon, it will not put the others out of poſſeſſion; but the poſſeſſion of one, by her clerk, ſhall be the poſſeſſion of all; ſo that the others may bring a *Quare Impedit*. *Dyer*, 259. *pl.* 20. 2 *Inſt.* 365.

the poſſeſsion of one is the poſſeſsion of the others to ſeveral other purpoſes(*o*). [54] But the entry of one will not veſt the eſtate and poſſeſsion in the others if it would be for their *diſadvantage*(*p*). [55]

365. *F. N. B.* 34. I. U. *Bro. Quare Imp.* 52. 108. 139. *Co. Litt.* 243. a. 17 *Vin.* 405. Preſentm. (K. c.)

And ſuch alſo ſeems the law as to joint-tenants. 2 *Inſt.* 365. *Bro. Quare Imp.* 3. *Co. Litt.* 186. b. 17 *Vin.* 404. Preſentm. (K. c.) *pl.* 1.

But ſee *contra*; *Bro. Quare Imp.* 52. *F. N. B.* 35. W. and *Vin. ubi. ſup.* Yet the law and the reaſon of the thing ſeem in their favour.

And it is ſaid to be the ſame as to tenants in common. See 1 *Anderſ.* 63. But *quære* as to this; and ſee 17 *Vin.* 405. Preſentm. (K. c.) *pl.* 2. and *Bro. Preſent. al Eſgliſe*, *pl.* 1.

(*o*) See *Brooke*, *Remitter*, 16. *Seiſin*, 44. *Gilb. Ten.* 29. *Litt.* ſ. 398. *Co. Litt.* 243. b. 373. b. *Hob.* 120. Smale & Dale. *Robinſ. Gavelk.* b. 1. ch. 6. p. 113.

"To ſeveral purpoſes," but not to all. See *Brooke*, *Coparcener*, 8. *Dyer*, 128. *pl.* 58. Ballard *v.* Ballard. *Gilb. Ten.* 28. and next note (*p*).

(*p*) *Brooke*, *Coparcen.* 1. *Entre Cong.* 9. *Voucher*, 23. See *Finche's L.* b. 2. ch. 3. p. 118—19. and *Co. Litt.* 253. b.

Brother or sister.

So THE ENTRY OF A YOUNGER BROTHER OR SISTER, (although they are but of the HALF-BLOOD,) is the possession of the eldest brother, or other sisters (*q*). [56] And it seems that such entry will make POSSESSIO FRATRIS VEL SORORIS in the heir at law, even though it be to the exclusion of the very person who enters (*r*).

By a stranger.

And as a possession may, in many cases, be gained by THE ENTRY OF AN INDIFFERENT PERSON IN HIS NAME, AND TO HIS USE, WHO HAS RIGHT; and this often by mere oral authority, and sometimes even without any expressed authority at all (*s*); so

(*q*) See *Gilbert's Tenures*, 28. 158. *Litt.* sec. 396. *Co. Litt.* 242. a. & b. *Plowd.* 306. a. See *Hale on Fitz. Nat. Brev.* 166. (L.) p. 455. note (*a*). *Bull. Nisi Prius*, 102. *Jenk. Cent.* 242. *pl.* 25. See it also in 7 *Viner's Abr.* 585. Descent (K.) *pl.* 34. and 36. and in *Co. Litt.* 15. a. note (4). See also *Jenk. Cent.* 42. *pl.* 79. And the books cited *ante*, N. (*n*).

(*r*) See *Jenk. Cent.* 242. *pl.* 25. *Ibid.* 42. *pl.* 79. *Plowd.* 306. And see notes (*n*) and (*q*) before, and the authors there referred to.

(*s*) Thus an husband may desire any person who lives near where the lands lie, to enter in the name of

ſo it ſeems that THE ENTRY OF A PERSON Attorney.
PROPERLY DEPUTED will be ſufficient to [57]
give

of himſelf and wife; and the entry of ſuch perſon will, it ſeems, be ſufficient to entitle the huſband to his curteſy (1). So if a perſon enter, without any previous authority, in the name of him who ſhould enter for condition broken, it will veſt the eſtate in him to whom it was limited on the breach of ſuch condition, ſo as to maintain an ejectment; if it be aſſented to before the day of the demiſe laid in the declaration (2). So a ſtranger may enter, and it ſhall avoid a fine, though levied with proclamations, if the entry be by precedent command, or be afterwards aſſented to; but not otherwiſe (3). So if a perſon enter for a forfeiture in the name of him in reverſion, though without expreſs authority (4). So, generally, if a perſon enter in the name of him who has right, even though it be without a precedent command or ſubſequent aſſent; and whether he who has right be an infant or of full age, it ſhall veſt the freehold in him who has ſuch right.

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(1) *Perkins*, ſ. 470. and ſee ſ. 464. And ſee *Preſt. on Eſtates*, 485.

(2) See 2 *Strange*, 1128—9. Fitchett *v.* Adams. And a *verbal* aſſent is ſufficient, (Fitchett & Adams); But it is abſolutely neceſſary that *an aſſent* be given. See *Cro. Jac.* 56. Curties *v.* Wolverſton.

(3) *Brooke, Entre Cong.* 123. 9 *Co.* 106. a. See *Co. Litt.* 258. a. 1 *Cruiſe*, 307. 2 *Com. Dig.* Claim, (B. 2.)

(4) *Brooke, Seiſin*, 21. and ſee 2 *Strange*, 1128—9. and *Brooke, Entre Cong.* 123. and *Co. Litt.* 245. a.

give an actual seisin, and make a POSSESSIO FRATRIS in him by whom he is so de-
[58] puted (*t*). But we may observe that POSSESSIO

right (5). So the possession of the husband is the possession of the wife, and *e converso* (6), &c. &c. &c. &c.

(*t*) See *Litt.* sec. 432. *Co. Litt.* 257. b. 258. a. 9 *Co.* 75. Combes's case. *Gilb. Ten.* 37. *Plowd.* 93. 1 *Cruise*, 307. See *F. N. B.* 179. G. p. 414. 4to edit. 1755.

Et pur ceo si tielx heires issi seisis par eux, ou par procuratours, ou par baillyfs, ou autres, que en lour nosme serrount mys e. seisine, soient engettes par autres que p. nous de quel age que ils soient, si volons que ils recoverount par ceste assise, &c. *Vide Britt. cap.* 42. *De Disseisine*, 107. a. (232).

And, indeed, when we consider that an ACTUAL SEISIN is necessary to be given and received by the respective parties, in order to give effect and consummation to a *feoffment*, and that such seisin may be taken BY ATTORNEY (1), (constituted by deed) (2), as well

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(5) *Perk.* s. 48. *Brooke, Seisin*, 50. *Co. Litt.* 245. a. 258. a.

(6) 8 *Co.* 44. a. See *Bro. Seisin*, 17. *Perkins*, s. 46. 470. 464. 1 *Roll. Abr.* 314. *Avowrie*, (D.) *pl.* 6. 5 *Com. Dig.* 444. Seisin, (C.) 5 *Com. Dig.* 167. Pleader, (2 A. 1.) *Co. Litt.* 29. a. *Noy's Max.* 82. *Post.* sect. 3.

(1) See *Co. Litt.* 48. b. 49. b. 52. 2 *Comm.* 315. ch. 20. 3 *Com. Dig.* 341. Feoffment, (B. 3.) *Kitch.* 137. *Brooke, Feoffmente*, 67. And see 5 *Co.* 94. b. 95. a.

(2) See *Co. Litt.* 52. a. and note (1.); 48. b. and note (2). *Kitch.* 137.

SESSIO FRATRIS is not much favoured (*u*): and a ſtricter ſeiſin is requiſite to make ſuch

well as in perſon, ſo as to fix the actual poſſeſſion in the feoffee; may it not be aſked, Why ſhould not the entry by a perſon lawfully authorized fix the actual poſſeſſion in the heir? Why may he not thus receive the ſeiſin neceſſary on *a deſcent*, as well as that which is requiſite on *a purchaſe?* Or as well as recover the actual poſſeſſion of lands of which he had been *diſſeiſed* (3)? Or as make *a continual claim*; which will amount, in many caſes, to an actual entry (4)? If he can recover the ACTUAL POSSESSION of lands of which he has been DISSEISED, BY ATTORNEY, why may he not obtain actual poſſeſſion, by attorney, of lands *whereon a ſtranger has* ABATED? In either caſe he has a right and title to enter (5). And if he can thus recover an actual ſeiſin of lands, when ſuch actual ſeiſin IS IN ANOTHER, why may he not enter by

(*u*) Per *Gould* and *Blackſtone*, *Juſtices*. 3 *Wilſ.* 520. See 3 *Atkins*, 471. De Grey *v.* Richardſon. 1 *Veſ.* 177. Cunningham *v.* Moody. 2 *P. Wms.* 735—6. Cowper *v.* Earl Cowper.

And note: It is always *intended* or *preſumed*, that a perſon claiming is of the *whole-blood*, till the contrary be ſhewn. *Kitch.* 225. a. and *Plowd.* 77. a. *Trin.* 19 *Hen.* 8. *pl.* 6. *fol.* 11. b.

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(3) See *Co. Litt.* 48. b. and note (6).

(4) See *Litt.* ſ. 432. *Co. Litt.* 257.

(5) *Co. Litt.* 258. a. and ſee *Ibid.* 237. b. 238. *Bla. Comm.* 175. ch. 10.

[59] ſuch POSSESSIO FRATRIS than even to maintain a writ of right(*x*).

Act of ownerſhip. However, Mr. Robinſon conceives that, in all caſes, WHERE THE HEIR EXERCISES ANY ACT OF DOMINION OVER THE INHERITANCE, (as by repairing houſes, fences, &c. or by receiving rents, ſee *ante*, p. 48.) it will amount to an actual entry(*y*).

[60] Recovery. We have before obſerved (*z*), that if an elder brother SUFFER A RECOVERY, and

by attorney where the poſſeſſion is VACANT, and ſo no one to ſuffer? If another enter in the name of the heir, is not there an equal notoriety as if he had entered himſelf? It has been repeatedly ſaid, that an ACTUAL ENTRY is neceſſary to avoid a fine levied with proclamations (6); and yet we have ſeen (7) that ſuch entry *may* be by attorney.

(*x*) See *Co. Litt.* 281. a.

(*y*) *Law of Inheritances in Fee-Simple*, &c. 33. note (*i*), ch. 4. cites 1 *Leon.* 265. and *Co. Litt.* 15.

(*z*) *Ante*, ſec. 1. p. 18. note (*p*).

(6) See 2 *Com. Dig.* 302—3. Claim, (B. 1.) 6 *Ibid.* 260. *Cruiſe on Fines*, 304. 2 *Strange*, 1086. Berington *v.* Parkhurſt & *al.* *Douglas*, 483. Goodright *v.* Cator. *B. N. P.* 103. 1 *Mod.* 10. Clerke *v.* Rowell. 3 *Burrow*, 1897. Dates *d.* Wigfall *v.* Brydon & *al.*; and *poſt.* 113. N. (y). Jenkins *d.* Harris & *Ux.* *v.* Prichard & *al.*

(7) See p. 57. note (3).

die

die, AND NO EXECUTION BE SERVED, it will NOT make a POSSESSIO FRATRIS in him to cause the sister to inherit, to the exclusion of the half-blood; for till execution served, the recovery does not operate.

Of incorporeal hereditaments.

If the hereditaments claimed be INCORPOREAL, IT IS REQUISITE, in order to give seisin of them to the heir, so as to make HIM the stock of descent, THAT HE ACTUALLY RECEIVE THE RENT, PRESENT TO THE ADVOWSON, &c. (*a*), (unless such advow-

(*a*) See *ante*, sec. 1. p. 23. And see also *Co. Litt.* 15. b. *F. N. B.* 36. (E.) *Kitch.* 109. It was said by the Master of the Rolls, (Sir Joseph Jekyll), in the case of Penville *v.* Luscomb, (*Mosley's Rep. Temp. King.* 72.) that, in order to make a *possessio fratris* of an equity of redemption on a mortgage in fee, the elder brother should have brought his bill against the mortgagee; or the mortgagee should have paid him the rents and profits. And, therefore, where the father made a mortgage in fee, and died after forfeiture, leaving a son and a daughter by one wife, and a son by another, and the eldest son died without bringing his bill, his Honour decreed the equity of redemption to the younger brother.

son,

ſon, &c. BE APPENDANT or APPURTENANT TO A MANOR, &c. of which he has already obtained AN ACTUAL SEISIN). For though, as we have ſeen (*b*), a ſeiſin *in law* in incorporeal hereditaments will, in ſome caſes, entitle an huſband to his
[61] curteſy, yet it will *not* be ſufficient to turn the deſcent, but AN ACTUAL SEISIN muſt be acquired.

Appendancies and incidents.

If an advowſon BE APPENDANT OR APPURTENANT TO A MANOR, then ACTUAL SEISIN OF THE MANOR WILL (as before hinted) GIVE ACTUAL SEISIN ALSO OF SUCH ADVOWSON AS ITS APPENDANCY (*c*). But if a perſon be diſſeiſed of a manor whereto an advowſon is appendant, he may, notwithſtanding, preſent to the advowſon before he regain the ſeiſin of

(*b*) *Ante*, ſec. 1. p. 39.

(*c*) See *Co. Litt.* 15. b. note (1); 29. a. note (4); 49. a. *Gilb. Ten.* 18. and *F. N. B.* 36. (E. and F.) *Co. Litt.* 333. b. 349. b. 363. b. *Hobart*, 126—7. Chancellor of Cambridge *v.* Walgrave. See 1 *Strange*, 54. Newman *v.* Holdmyfaſt. 2 *Strange*, 1011—12. Rex *v.* Epiſc. Landaff. *Moore*, 90. *pl.* 223. Playre *v.* Crouch & *al.* See *poſt.* ſec. 4.

the manor (*d*). And as ſeiſin of the principal is ſeiſin of the acceſſory, ſo the recovery of, or remitter to, the principal, is the recovery of, or remitter to, the acceſſory alſo; but not *e converſo* (*e*). And, therefore, if another, during ſuch diſſeiſin, uſurp ſuch preſentation, yet, on his remitter to the manor, ſuch uſurpation is purged, and he ſhall be remitted to the [62] advowſon alſo (*f*). But though recovery of the principal will reſtore him to the ſeiſin of the acceſſory, yet the exerciſing any act over the acceſſory will not give him ſeiſin of the principal: and, conſequently, if A. be diſſeiſed of a manor to which an advowſon is appendant, and dies before recovery, leaving a ſon and a daughter by one ventre, and a ſon by

(*d*) See *Co. Litt.* 122. b. 307. a. 333. b. *F. N. B.* 33. Q. *Bro. Preſent. al Eſgliſe.* 30. *Fitz. Abr. Preſent. al Eſgliſe.* 13.

(*e*) See *Co. Litt.* 151. b. 152. a. N. (3). 349. *Bro. Preſent. al Eſgliſe*, 30. and ſee alſo *Co. Litt.* 15. a. and N. (5). and *ante*, ſec. 1. p. 49. (f).

(*f*) See *Brooke, Preſentemente al Eſgliſe*, 31, 32. 1 *Lord Raym.* 302. Rex *v.* Biſh. of Cheſter.

another,

another, the eldest son (*g*) present to the advowson, but before he recover the manor die, after whose death the younger son enter into the manor, as the now heir of his father, he shall be entitled also to the advowson (subject to his brother's clerk); and the presentation of his elder brother shall not sever such advowson from the manor, so as to render it an advowson in gross; nor, consequently, make a POSSESSIO FRATRIS to cause the sister to inherit: but the younger son, on recovering the manor, shall recover also such advowson as its accessory (*h*).

[63] Rents and services.

As to the methods of gaining seisin OF RENTS AND SERVICES, I must content myself with referring to the books cited in the margin; as the whole would be too much to transcribe, so the insertion of one

(*g*) See *Fitzh. Abr. Quare Impedit.* 179. *Co. Litt.* 333. b. 17 *Vin.* 341. Presentation. (R. a.) *pl.* 9.

(*h*) See *Brooke, Present. al Esglise*, 30. *Co. Litt.* 29. a. and note (4). 306. b. 307. a. 349. b. 363. And see *Ibid.* 151, 152. and 3 *Wils.* 526—7. and *Trin.* 9 *Hen.* 6. 25. a.

part,

part, relative to the matter in hand, would be doing injuftice to the other (*i*).

If the hereditaments defcending be IN REVERSION OR REMAINDER EXPECTANT UPON AN ESTATE OF FREEHOLD, the heir may obtain what will be equivalent to AN ACTUAL SEISIN of them fo as to turn the defcent and caufe A POSSESSIO FRATRIS, BY GRANTING THEM OVER FOR LIFE OR IN TAIL. But of this more will be faid in a future chapter (*k*). Reverfions on freeholds.

(*i*) See 4 *Co.* 8, 9. Bevil's cafe. *Co. Litt.* 68. a. 153. a. 315. a. *Litt. Sec.* 235. *Jenk. Cent.* 284. *pl.* 14. *Cro. Jac.* 142. *pl.* 20. Brediman *v.* Bromley. 6 *Co.* 57. *F. N. B.* 177. *Brooke and Fitzh. Affize.* 2 *Brownlow*, 99. 5 *Com. Dig.* Seifin, (C). 3 *Viner*, Affize.

(*k*) See *poft.* ch. 3. fec. 1.

If A. dies, leaving a fon by one wife and a fon and a daughter by another, and the widow be endowed of a moiety by the cuftom, (the lands being copyhold,) and the two fons be admitted to the reverfion of the moiety of which the widow was endowed, and the fon by the fecond wife die, the admittance fhall not caufe a *poffeffio fratris* in him; fo as to make his fifter take. See 1 *Freem.* 45. Foxe *v.* Smith. So note; it is the entry, and not admittance, which makes a *poffeffio fratris* in copyholds.

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[64]

SECT. III.

How an actual Seisin may be defeated.

WHEN a person has obtained an actual seisin of lands, &c. he may again BE OUSTED OF THE FREEHOLD(*a*), by the wrongful act of another individual; and this is termed A DISSEISIN. By such disseisin the actual possession is in the disseisor, and the disseisee has but a right. But such right would regularly descend to his heir at law in the same manner as if clothed with the possession: but if the disseisee had died, and the right descended to his heir, and such heir had died also,

Disseisin.

A right descending.

Half-blood.

(*a*) See 1 *Burr.* 107. Taylor *d* Atkyns *v.* Horde & *al.* *Cowp.* 701. S. C. *Co. Litt.* 181. a. *Terms de la Ley.* Disseisin. 3 *Bla. Comm.* 169. ch. 10.

And the disseisor gains the fee. See *ante*, sec. 1. p. 2. N. (*c*).

leaving

leaving a brother of the half, and a ſiſter of the whole-blood, and without having ever recovered the poſſeſsion of the premiſes; the brother of the half-blood would ſucceed to the inheritance, and not the ſiſter of the whole. For ſuch heir having had only a right, and no actual poſſeſsion or ſeiſin, he could not have turned the deſcent: So that, on his death, the perſon ſhould ſucceed who could make himſelf [65] heir, not to ſuch heir of the diſſeiſee, but to the diſſeiſee himſelf; he being the perſon who was laſt actually ſeiſed. For though the diſſeiſin deprived him of the actual poſſeſsion or ſeiſin, yet it only related to the time of ſuch diſſeiſin made; and would not have relation to any *prior* event: ſo that as he was once actually ſeiſed, that actual ſeiſin ſhall not be *ab initio* defeated; but the pedigree ſhall run, and the claim be made from, him, as being ſo ſeiſed.

Seiſin defeated *ab initio*.

But there is yet a mean by which the actual ſeiſin or poſſeſsion of him who has ſucceeded to an inheritance may, as to the portion to which ſuch mean ſhall extend,

tend, be not only taken out of him from the time of the operation of ſuch mean, but ſhall be abſolutely, and *ab initio*, deſtroyed; and ſo as to have relation to the eſtate of a precedent poſſeſſor, and utterly defeat the ſeiſin or poſſeſsion of the

By dower.

perſon ſo ſeiſed: and this is by THE ENDOWMENT OF THE WIDOW of ſuch precedent poſſeſſor.

Dowager *in* by her huſband.

[66]

For by the endowment of ſuch widow, (for inſtance, the mother of the heir,) ſhe is *in* from her huſband, and not from the heir; and her eſtate is, as it were, the continuance of that of her huſband (*b*). So that, during her poſſeſ-

(*b*) And by reaſon of this relation to the eſtate of her huſband, it is, that a remainder limited on an eſtate in dower, (as where the heir endows his mother, and, at the ſame time, limits a remainder over to another,) is void: for as the particular eſtate, and the remainders limited thereon, muſt form together but *one* eſtate, the remainder limited on an eſtate in dower cannot be good: as the eſtate in dower ariſes from, and has relation to, that of the huſband, and reference to his death; and the remainder proceeds from the heir, and ariſes from the grant made by him: ſo that ſuch heterogeneous portions can never form *one* eſtate. See *Plowd.* 25. *Finche's L.* b. 1. c. 3. p. 13.

ſion

ſion (*c*) of the third * part of ſuch lands Reverſion.
as her dower, the heir can have NO ACTUAL SEISIN OF SUCH THIRD, ſo as to make A POSSESSIO FRATRIS. His entry being thus deſtroyed, and the widow *in* from her huſband, he has only the reverſion of ſuch third; and ſuch reverſion being on an eſtate of freehold, he can [67] have no actual ſeiſin of it, as we ſhall preſently evince. Not ſubject to *poſſeſſio fratris.* So that if the elder brother enters, and then endows his mother, and dies, the brother of the half-blood ſhall have the third ſo given in dower (*d*). So Dower.

(*c*) The freehold is not in the widow till ſhe *enter* into the lands aſſigned, or *the ſeiſin be actually delivered by the ſheriff.* See *Co. Litt.* 32. b. 37. a. N. (1). Hale's MS. *Litt.* ſ. 393. *Maintenant apres ceo que la Feme* ENTER ET AD LE POSSESSION *de meſme la Tierce part, &c.* *Dyer*, 278. a. *pl.* 4. *Perk. S.* 423. *Dr. & Stud. b.* 2. *ch.* 13. *Ante*, 50. N. (f). and *poſt.* 80. 83.

* Note; the *third* part of the lands is mentioned here only by way of example; for what is ſaid is equally applicable to whatever portion the widow takes.

(*d*) *Co. Litt.* 15. a. 31. a. 240. b. 241. a. *Litt.* ſ. 393. *Brooke*, *Deſcent*, 19. *Dower*, 87. 100. *Mordanceſt.* 3. 6.

if he enter, endow her, and die, his own wife ſhall not be endowed of ſuch third (*e*).

Or curteſy. Or if the heir be a daughter, and ſhe enter, and endow her mother, and die, her huſband ſhall not be tenant by the curteſy of it (*f*). So where there are grandfather, father, and ſon, and the grandfather dies; the father dies, (either before or after entry,) and the ſon enters and endows his grandmother; his and his father's ſeiſin is deſtroyed; (and if there had been twenty deſcents, alienations, or diſſeiſins, they

[68] would all be defeated;) and the ſon has only a reverſion on an eſtate of freehold,

(*e*) See *Co. Litt.* 31. a. and b. *Brooke*, *Seiſin*, 18. 4 *Rep.* 122. a. Paine's caſe, *cited.* *F. N. B.* 149. H. *Perkins*, ſ. 301. 315. And ſee *Fitz. Abr. Dower*, 49. 166. 170.

See *Fitz. Abr. Dower*, 130. *contra*, which cites *M.* 23. *Ed* 3. But there is no ſuch caſe in the printed Yearbook of that term.

But ſee *M.* 24. *Ed.* 3. *pl.* 18. *fol.* 32. b. 33. a. and *pl.* 80. *fol.* 70. b. 71. a. where it appears that the opinion of the court was, that the widow of the father was *in* by her baron, and ſo the ſeiſin of the ſon, as to ſuch third, defeated.

(*f*) *Kitch. Courts*, 159. *Brooke*, *Ten. par le Curteſie*, 10.

as has been ſaid: for by the endowment of the grandmother, every meſne eſtate was defeated (*g*). Meſne ſeiſin defeated.

But we muſt be mindful to obſerve, that it is the poſſeſsion of the widow of ſuch third AS HER DOWER (*h*), that thus defeats Widow poſſeſſing the third *as dower*.

(*g*) "*Et non alloc.*" Car meſq. xx. fuer. ſſis. pu: la Mort le Bar. unc. l'entr. la Fee. ſerr. ſup. p. le Bar, qnt. ele eſt eins in Eſtat. de Dow. *M.* 24. *Ed.* 3. *pl.* 18. *f.* 33. a.

Bro. Mordanceſt. 3. *Co. Litt.* 31. a. and b. See 2 *Inſt.* 154. *Perk.* ſ. 315, 316. 4 *Co.* 122.

Yet this ſhall not defeat the eſtate of a baſtard *eigne*; and, therefore, if the baſtard die ſeized, and his iſſue endow the widow of the baſtard, or the widow of the baſtard's father, yet the eſtate in dower ſhall not have relation ſo as to defeat the eſtate of the iſſue as to ſuch third; for the dying ſeiſed of the baſtard, and the deſcent to his iſſue, eſtabliſhed his title to the whole; and, being once fixed in the iſſue, the law will not permit it to be afterwards defeated; or the legitimacy of the baſtard called in queſtion after his deceaſe. 8 *Co.* 101. b. *Co. Litt.* 244. a. and *vide Gilb. Ten.* 29. &c. and *Watk.* N. xxvi. and 1 *Salk.* 120. Pride *v.* Earls of Bath and Montague.

(*h*) But note: If the heir aſſigns dower of lands of which the huſband was ſeiſed, but of which the wife was not dowable, yet ſhe is *tenant in dower* of the lands

feats the feifin of the heir, For when fhe poffeffes it *as her dower*, fhe is *in*, as we have faid, from her hufband, and her eftate is, as it were, the continuance of his: But if fhe poffeffes it (either by itfelf, or with the other parts) *in any other manner* than as her dower, the feifin of the heir will *not* be thereby deftroyed: as if, after the death of her hufband (*i*), and before endowment, fhe accepts a leafe for life, or years, of the heir (*k*). For fhe is now *in* of

Not as her dower.

[69]

Acceptance of leafe by the dowrefs.

lands affigned. *Finche*, *L*. b. 1. ch. 3. p. 36. *Co. Litt*. 34. b. note (9). *Hale's MSS.*

So if the widow be endowed, and afterwards exchanges with the heir for other lands, yet fhe is *tenant in dower* of the lands fo *taken* in exchange, and fhall be *in* of them by her hufband. *Hale's MSS.* as above.

(*i*) For if fhe accepts fuch leafe *during the life of the hufband*, it will be no bar of her dower; as, while he is living fhe can have only a title to dower, and not an immediate right. Befide, fhe being under coverture, her acceptance is not conclufive, but waivable after his death. See *Jenk.* 15, 16. *pl.* 27.

(*k*) *Perkins*, *Dower*, f. 350. *F. N. B.* 149. (E.) *Kitch.* 160. See *Brooke*, *Dower*, 27. *Jenk. Cent.* 73. *pl.* 38.

So if fhe accepted the guardianfhip of the heir in chivalry, fhe was barred during his non-age; *i. e.* while

of *her own* eſtate, which can have no relation to that of her huſband, ſo as to coaleſce with, and conſtitute a continuance of, his eſtate. And as the heir had gained an actual ſeiſin of the whole, theſe eſtates (for life or years) are portions of *his* intereſt, and not derived from an intereſt which was anterior or paramount to his own: ſo that his ſeiſin will not be thereby defeated; but the perſon claiming on his death muſt make himſelf heir to him, as of the perſon laſt ſeiſed.

If the leaſe ſo accepted by the widow [70]
be for *her life*, it will be an abſolute and For life.
effectual bar of her dower for ever: for as ſhe is already poſſeſſed of the lands, how can ſhe demand them? She cannot demand them againſt herſelf (*l*). Beſides, as ſhe voluntarily accepted ſuch leaſe, ſhe ſhall be eſtopped and concluded by her own act. If the leaſe be *for years* only, For years.

while the guardianſhip continued. See *Brooke*, *Dower*, 27. and 42. *Hale on F. N. B.* p. 350. note (*b*). See further *Jenk. Cent.* 15, 16. *pl.* 27. and 73. *pl.* 38.

(*l*) *Perkins*, ſ. 350.

it

it ſeems that ſhe may again demand her dower when ſuch term is expired (*m*); for between the expiration of the term and her own death, (for when we ſay that the widow may demand her dower *after* the expiration of the term, it muſt neceſſarily be ſuppoſed, that ſhe be then living; for otherwiſe ſhe could not demand it at all,) there muſt have been a time when the heir poſſeſſed the lands from which ſhe was not then excluded from demanding her dower. If, therefore, the widow recovers her dower after the expiration of the term, it ſeems to follow, from the principles already laid down, that the eſtate then obtained
[71] ſhall have immediate relation to that of her huſband; ſo that ſuch her eſtate will be paramount to the title of the heir, and defeat the ſeiſin he at firſt gained, and which continued during the term, and put him in the ſame ſituation, with reſpect to ſuch third, as if he had never being ſeiſed at all. And in caſe the immediate

(*m*) See *Fitz. Nat. Brev.* 149. E. and *Kitch. Courts*, 160. b. And ſee alſo *Perk.* ſ. 350. *Brooke*, *Dower*, 27. and 42. and *ante*, p. 69. note (*k*).

heir

heir of the huſband had died during the continuance of the term, and the lands had deſcended to *his* heir, and if *he* had left a ſon and a daughter by one wife, and a ſon by another, the ſon by the firſt wife, being his heir when he died, would, of courſe, have ſucceeded to the inheritance. And in caſe this firſt ſon had died alſo, during the continuance of the term, without iſſue, the daughter would have inherited the lands: for, as the term exiſted, the ſon by the firſt ventre *had* a ſeiſin ſufficient to make a POSSESSIO FRATRIS(*n*); for as the widow could not yet have recovered her dower, his ſeiſin could not yet have been defeated. But had the lands thus deſcended to the daughter, and, during the eſtate of ſuch [72]
daughter, the term had expired, and the widow had recovered her dower, and died in the daughter's life-time; or, during the continuance of the term, the daughter had died, leaving a ſon; and, in his life, the widow had recovered her dower; now, though the daughter was, at the death of

(*n*) See *ante*, ſec. 2. p. 48.

her

her eldeſt brother, and during the continuance of the term, (while ſhe lived,) the perſon entitled by law to the eſtate, and in the actual poſſeſsion of it; yet, by the recovery of dower by the widow, the ſeiſin of her eldeſt brother and herſelf in the one caſe, and of her brother, ſelf, and ſon, in the other, ſhall be deſtroyed: ſo that, in the firſt caſe, ſhe herſelf, and in the ſecond, her ſon, ſhall be excluded from the inheritance of the third ſo recovered; and the brother (or uncle) of the half-blood ſhall be heir to it(*o*).

Leaſe to a ſtranger for life by the heir, againſt whom dower is recovered.

But if the heir enter on the death of his anceſtor, and, *before* endowment, he leaſe the whole lands to a ſtranger *for* LIFE, againſt whom the widow recovers her dower, and afterwards the heir dies, the ſiſter of the WHOLE-BLOOD ſhall have the [73] reverſion in fee, and not the brother of the half-blood: becauſe the heir (or eldeſt ſon) had altered the reverſion by his leaſe for life; and the tenant in dower left the

Poſſeſſio fratris.

(*o*) See *poſt.* ch 3. ſec. 1.

reverſion

reverſion in the leſſee (*p*). So had the heir made ſuch leaſe *after* the recovery of the widow, though there remained but a reverſion on a freehold in the heir, (as to ſuch third,) yet, on his leaſe of the whole lands, ſuch reverſion would paſs (*q*); and, conſequently, by ſuch leaſe for life of the reverſion, a POSSESSIO FRATRIS would be made (*r*).

Heir apparent taking *by purchaſe*; againſt whom the widow recovers dower.

But when it is ſaid, that the ſeiſin of the ſon is deſtroyed by the endowment of

(*p*) See 8 *Co.* 35. b. *Co. Litt.* 15. a. and the books cited.

(*q*) See *Plowd.* 155. 161. 433. 10 *Co.* 107. a. and b. Paſmer's caſe, cited. 1 *Leon.* 180. Howe & Conney.

(*r*) See *poſt.* ſec. 4. and ch. 3. ſec. 1.

But had he leaſed them for the life of the leſſee, and died before him; or had he leaſed them for *his own* life, *his* widow would *not*, by reaſon of ſuch alienation, be entitled to dower on the death of the firſt widow, who recovered againſt him, of the third aſſigned to her. For, notwithſtanding the alienation, it would ſtill continue a reverſion *on a freehold*; and, conſequently, not ſubject to the dower of his wife. See *Bro. Deſc.* 19. and *Seiſin*, 18. cites 19 *Ed.* 2. (*Vide Paſch.* 19 *Ed.* 2. *p.* 662. *Mayn.*) and *Fitz. Abr. Dower*, 166.

the

the widow, it muſt be underſtood that the ſon took the eſtate BY DESCENT: And as to the ſubject of deſcents, this is ſufficient to our purpoſe. But as there is a difference in this reſpect with regard to dower, between a deſcent and purchaſe, and as we have already ſpoken ſo much on that head, it may not be improper to notice it here. Thus, if the grandfather
[74] had ENFEOFFED the father, or made A GIFT IN TAIL to him, the wife of the father, after the deceaſe of the wife of the grandfather, ſhould have been endowed of the part aſsigned to the grandmother equally as of the other two-thirds; becauſe THE PURCHASE OR GIFT that took effect IN THE LIFE OF THE GRANDFATHER (*before* the title of the grandmother was conſummated) is not defeated *ab initio*, but only *quoad* the grandmother, as to ſuch third. But had the father taken BY DESCENT, he could not have been entitled TILL THE DEATH OF THE GRANDFATHER; at which time the title of the grandmother *was* conſummated; and ſo, on the recovery of it, formed one eſtate with his. But as the purchaſe took effect in the life-time of

of the grandfather, there was a time when the father was seised of the premises so as not to be defeatable by the grandmother, of which seisin his wife might have been endowed; as the grandmother's recovery of her dower would only relate to the *death* of the grandfather; so that when she recovered it, it *would* divest or defeat the seisin gained BY DESCENT, but *not* that gained BY PURCHASE, saving only as to [75] *her own* estate (*s*).

Mother endowed before the grandmother.

And again: If the wife of the father be endowed by the son *before* the wife of the grandmother, and then the grandmother recover against the mother, yet it is said that the mother shall enter again on the death of the grandmother: for the estate for the life of the grandmother was less, in the eye of the law, than the estate for her own life (*t*). But if, on the recovery of the grandmother, her estate so recovered shall have relation to that of her husband, and, consequently, defeat the seisin of the

(*s*) See *Co. Litt.* 31. a. and b. and 4 *Co.* 122. a. and b.

(*t*) See *Co. Litt.* 31. b. *Perkins*, sec. 316.

father,

father, will it not deſtroy alſo the dower of his wife? As dower is only of ſuch eſtate of which the huſband was SEISED (*u*), does not the dower of the wife depend upon the ſeiſin of the huſband? And if the ſeiſin of the huſband be defeated by the endowment of the grandmother, is it not the ſame as if he had never been ſeiſed at all? And if he had never been ſeiſed at
[76] all, how could his widow recover or claim her dower? If the father had been ſeiſed, and then the grandmother had been endowed, it would certainly have defeated his ſeiſin as to the third aſsigned; and, if the father had died in the lifetime of the grandmother, he could have had no ſeiſin at all of the third ſo recovered, his firſt ſeiſin being thus deſtroyed; and, conſequently, his widow could not have been endowed (*x*).

The reaſon given by PERKINS (*y*) for the mother's re-entry on the grandmother's

(*u*) *Ante*, ſec. 1. p. 36. 37.

(*x*) See *Co. Litt.* 31. a. and note (6); 241. b. 4 *Co.* 122. *F. N. B.* 149. H.

(*y*) See *Perkins*, ſec. 316. "Pur ceo que el fuit endowed de ceo par luy."

death

death is, becaufe being endowed by, or having recovered againft, the fon, fhe fhall now hold againft him; for, by his endowing her, he acknowledged her right, and therefore fhall not be permitted to claim againft his own act. But as the mother could not be endowed *before* the father's death, and the grandmother recovered againft her afterwards, her eftate fo recovered had relation to that of the grandfather, and fo defeated the father's feifin: [77] fo that he having had his feifin deftroyed, her holding this *as her dower* muft be confidered in a light very fimilar to that in which fhe is faid to hold in dower where the heir afsigns her a third of lands to which fhe had *no* title (z). BROOKE, when fpeaking of this matter, fays, (a), that the mother may re-enter on the death of the grandmother, becaufe fhe was attendant on her. But this attendancy feems rather the confequence than the caufe of the exiftence of the right of the mother in the third afsigned to the grandmother.

(z) See *ante*, p. 68. note (*b*).

(a) *Dower*, 79. "Car l'ayles fuit attendaunt a luy."

If the mother be endowed by the heir of the third of the whole premiſes, and the grandmother recover againſt the mother ſuch third; and the mother recover againſt the heir the third of the two remaining parts, and the grandmother die; now the widow of the father muſt re-enter into the whole of the third ſo recovered by the grandmother; for if it be a third of ſuch third, the third of ſuch third is uncertain, and ſo ſhe could not enter without
[78] aſsignment. I ſuppoſe, therefore, that her eſtate in the third of the two remaining thirds becomes, on her re-entry into the third recovered by the grandmother, *ipſo facto* void. And this ſeems to be what is meaned by BROOKE, when he notes, that "the heir may then enter into the ſecond dower; for the mother ſhall not have both (*b*)."

The reaſon then of this caſe may, perhaps, be as follows: Though the endow-

(*b*) *Dower*, 79. "L'heire poet entrer donque en le ſeconde dower; car el (la feme le pere) navera ambideux."

ment

ment of the grandmother defeated the ſeiſin of the father, and ſo, in theoretic ſtrictneſs, in like manner defeated alſo the dower of his wife, yet this ſtrictneſs may, perhaps, eſpecially in caſe of dower, which the law much favours, be deemed too refined, and ſo diſregarded that the eſtate, being, on the firſt endowment of the mother, veſted in her by the law, or the act of the heir, ſhall not be abſolutely deveſted in point of intereſt; but the eſtate for the life of the grandmother being, in legal conſideration, leſs than the eſtate for her own life, ſhe ſhall be conſidered as having yet a right, an intereſt, in contemplation of law: ſo that during the life [79] of the grandmother, the grandmother ſhall be attendant on her, and not on the heir (as a proof of the continuance of her eſtate): and, having thus a ſubſiſting intereſt, and the poſſeſsion only being detained, ſhe may be allowed, on the death of the grandmother (and in order to prevent the expence, &c. of a new endowment, her title being already proved or acknowledged) to re-enter into the third ſo recovered; when her eſtate and intereſt

in the third of the two remaining thirds ſhall become abſolutely and *ipſo facto* void; being only given her in conſideration of her being deprived of her enjoyment or poſſeſsion of ſuch the third of the whole, and for her ſupport during ſuch deprivation: and thus the aſſertions of COKE, BROOKE, and PERKINS be reconciled: but if we maintain the ſtrictneſs before ſpecified, (which ſeems to me to be well-founded, and inevitably to follow from the principles before laid down, though perhaps too nice for practice,) I do not perceive how the doctrine mentioned, of the
[80] mother's re-entry, can be ſupported as law. But, whatever be the true reaſon of ſuch re-entry, ſuch re-entry is, according to theſe authors, ſtrictly legal: and the law is always ready to take advantage of the moſt trifling circumſtance which can tend to the benefit of widows(*c*), whom it much favours(*d*).

(*c*) See *ante*, ſec. 1. p. 32. &c.

(*d*) See *Co. Litt.* 33. 37. 2 *P. Wms.* 703—4. Banks *v.* Sutton *Jenk. Cent.* 9. *pl.* 15. 50. *pl.* 95. 72. *pl.* 35. *Cro. Jac.* 111. *pl.* 8. Smith *v.* Smith. 393. *pl.* 5. Herbert *v.* Binion.

But to return: Thus, by THE ENDOWMENT OF THE WIDOW of a precedent poſſeſſor, when the heir takes the hereditaments *by deſcent*, will the ſeiſin of ſuch heir be defeated: CURTESY will not admit of any meſne ſeiſin at all (*e*); otherwiſe, the conſequences of it, as to this point, would have been the ſame; it being equally an eſtate of freehold, and taking effect in reality, as dower does by relation, before any intereſt be veſted in the heir (*f*). The law does not caſt the poſſeſsion of the eſtate in dower, (*i. e.* of dower AT COMMON LAW; for with reſpect to free-bench of COPYHOLDS it is otherwiſe (*g*)—), on the widow

Curteſy, Admits of no meſne ſeiſin.

[81]

Dowreſs cannot enter without aſſignment.

(*e*) See 8 *Co.* 35. a. and b. Paine's caſe. *Co. Litt.* 29. b. 30. a. *Litt.* ſ. 394. and *Co. Litt.* 241. b. 2 *Inſt.* 154. *Termes de la Ley*, tit. *Curteſie d'Engleterre.* *Gilb. Ten.* 173. 2 *Bla. Comm.* 127—8. ch. 8.

(*f*) See *Co. Litt.* 29. b. 30. a. 241. b. 8 *Rep.* 36. a. 2 *Bla. Comm.* 127. ch. 8. See *F. N. B.* 194. D. *Termes de la Ley*, tit. *Curt. d'Englet.*

(*g*) See *Hob.* 181. Howard & Bartlett. and 6 *Viner's Abr.* 77. Copyh. (B. b.) *Bac. Abr.* 470. Copyh. (G.) and 5 *Burr.* 2787. Vaughan *d.* Atkins *v.* Atkins.

But it ſhould ſeem that if the cuſtom be that the widow ſhall have a *portion* only (as the half or third—

 See

widow (*h*): nor can ſhe enter without aſſignment by the ſheriff, or the agreement of the heir (*i*): ſo that, in this caſe, the heir

See *Co. Litt.* 33. b. *Kitch.* 105.) and not the whole of a copyhold, as her dower or free-bench, the poſſeſſion is not caſt upon her any more than at common-law. And an aſſignment in ſuch caſe would be equally neceſſary. See below, note (*i*), and *poſt*, 83, note (*o*). *Kitch.* 103. b. 3 *Leon.* 227. *Ca.* 303. 2 *Show.* 184. Chapman *v.* Sharpe.

So, of gavelkind-lands, of which the widow ſhall have a moiety, ſhe muſt demand her dower of the heir, and ſhall have it aſſigned by metes and bounds. See *Robinſ. Gavelk.* b. 2. c. 2. p. 175. &c.

See 2 *Watk. on Copyh.* 89, 90.

(*h*) See *Gilb. Ten.* 26.

(*i*) See *Litt.* ſ. 43. *Co. Litt.* 32. b. 34. b. 37. a. and b. *Brooke*, *Dower*, 16. *Scire Fac. pl.* 36. *Plowd.* 529. *Kitch. Courts*, 161—2. 2 *Bla. Com.* 135. ch. 8. See *Dyer*, 278. *pl.* 4. and *Perk.* ſ. 393.

But it ſhould be obſerved, that when it is ſaid that the widow cannot enter without aſſignment, it is meaned of dower AT COMMON LAW, as contradiſtinguiſhed, not only from dower BY CUSTOM, but alſo from dower AD OSTIUM ECCLESIA and EX ASSENSU PATRIS. For as dower *at common-law* is of A THIRD PART, it is not left to the widow to determine *what is a third*. But if the dower had been AD OSTIUM ECCLESIA or EX ASSENSU PATRIS, of lands *expreſsly*

heir *may* firſt enter and acquire ſeiſin; but the law veſts the eſtate by curteſy in the huſband without any aſsignment, and even without entry, if the wife were already in poſſeſsion (*k*), but not otherwiſe (*l*), immediately on iſſue had; (by which circumſtance he becomes tenant *initiate*, though his eſtate is not conſummate till the death of the wife (*m*)—). So that there being [82]

Otherwiſe as to curteſy.

preſsly aſcertained at the time, the dowreſs might by law have entered on the death of her huſband, *without* any aſſignment. But ſuch methods of endowment are now obſolete. See *Litt.* ſ. 39. 43. *Co. Litt.* 34. b. 37. a. and note (1). *Dyer*, 278. *pl.* 4.

But it ſhould ſeem that, even in theſe caſes, the freehold is not in the widow till *actual entry*. N. (1). to *Co. Litt.* 37. a. *Hale's MSS.* and ſee *Dyer*, 278. a. *pl.* 4. and *ante*, 66. N. (*c*).

(*k*) *Bro. Præcipe quod reddat.* 88. *Dr. & Stud. Dial.* 2. c. 4. See 2 *Bla. Comm.* 127. ch. 8. 2 *Inſt.* 154. And ſee alſo *ante*, ſec. 2. p. 57. note (6).

(*l*) See *ante*, ſec. 1. p. 38—9.

(*m*) See *Doct. & Stud.* b. 2. ch. 4. and 2 *Inſt.* 154. *Co. Litt.* 30. a. and 40. a. and b. note (2). 2 *Bla. Comm.* 128. ch. 8. *Plowd.* 264. Note to Engliſh edit. and compare with *Co. Litt.* 32. 241. b. *Kitch.* 159. b. *Brooke, Ten. par le Curteſie*, 14. and ſee *Ibid. Villenage*, 67. and *Avowrie*, 27. 132.

no chaſm or intermiſsion from the death of the wife to the poſſeſsion of the huſband, as there is, in caſe of dower, between the death of the huſband and the poſſeſsion of the widow, no meſne ſeiſin can here take place. Beſide, the tenant by the curteſy holds immediately of the lord, and is tenant to him (*n*); whereas the dowager holds of the heir (*o*), and is attendant on ſuch heir for the third of the ſervices (*p*).

Tenant by the curteſy.

[83]

holds of the lord:

And widow of the heir.

But,

(*n*) 2 *Inſt.* 301. *F. N. B.* 258. A. See 2 *Comm.* 126. ch. 8. 8 *Co.* 36. a. Paine's caſe.

(*o*) *F. N. B.* 8. F. G. 258. B. 265. A. *Co. Litt.* 31. b. 241. a. and note (1). 2 *Bla. Comm.* 135—6. ch. 8. 8 *Rep.* 36. a. Paine's caſe. *Brooke, Tenures*, 84. *Kitch.* 209. b.

The widow ſhall hold as the heir holds, and not as the baron held. *Kielway.* 124. a. *pl.* 80. and 129. a. *pl.* 98.

If a woman be endowed of a manor, ſhe ſhall pay all ſervices to the heir as he pays over. *Plowd. Qu.* 90.

(*p*) See note (*o*), and *Perk.* ſ. 424. *F. N. B.* 8. F. 7 *Co.* 9. a. 8 *Co.* 36. a. 9 *Co.* 135. a. and b. *Termes de la Ley*, tit. *Attendante.*

If there be *no* heir, and the lord or donor enter for ſuch default, the widow ſhall hold by the third part of the ſervices of ſuch lord or donor: but if the lord or donor determine the eſtate of the huſband *by his own act*,

But, though the ſeiſin of the heir *may* be defeated, as we have obſerved, yet, where ſeiſin of an inheritance is once alleged, it ſhall always be intended to continue till the contrary be ſhewn (*q*). [84]

Continuance of ſeiſin.

act, as by purchaſe, ſhe ſhall *not* render *any* ſervices to him. See *Brooke*, *Tenure*, *pl.* 33. 82. and *Extinguiſhm.* 31. *Fitz. Abr. Dower*, *pl.* 130. *Perkins*, ſ. 429. *Kitch.* 209. b. and ſee *The Cuſtomes of Weſtſheen*, &c. art. iv. in 2 *Collect. Jurid.* 382.

(*q*) *Sir Thomas Jones*, 182. caſe of *Cockman* v. *Farrer*. And ſee *Plowd.* 193. a. 431. a.

Seiſin is alſo favoured in equity. See *Gr. and Rudim. of Law and Equity*, 66. rule 96.

SECT.

SECT. IV.

Of what Hereditaments a Poſſeſſio Fratris may be.*

A POSSESSIO FRATRIS may, generally ſpeaking, be of all HEREDITAMENTS, corporeal or incorporeal; as lands, rents, &c. (*a*). So of GAVELKIND-LANDS (*b*); of lands in BOROUGH ENGLISH (*c*); and of

* It is frequently ſaid in theſe pages that a *poſſeſſio fratris* may be of an uſe, truſt, &c. of which, ſtrictly ſpeaking, there can be no ſeiſin or poſſeſſion; and conſequently it ſeems a contradiction: yet it is ſo ſaid, not only in compliance with the uſual mode of expreſſion, but for want of a better term, and to prevent a prolixity. All that is meaned is, that the property is ſo fixed in a meſne perſon as to make *him* the ſtock of deſcent.

(*a*) See *Co. Litt.* 14. b. *F. N. B.* 36. E. And *ante*, ſ. 1. and 2.

(*b*) See *Robinſ. on Gavelk.* b. 1. ch. 6. p. 100.

(*c*) 1 *Com. Dig.* 615. Borough Engliſh.

of COPYHOLDS(*d*). Of AN USE(*e*): (*i. e.* of uſes *not* executed by the ſtatute; for uſes executed are legal eſtates(*f*)—). Of A TRUST(*g*). Of AN EQUITY OF REDEMPTION, (as ſeemingly by the better opinion(*h*)—). And although a POSSESSIO FRATRIS CANNOT properly be of A REMAINDER OR REVERSION EXPECTANT [85]

(*d*) *Gilb. Ten.* 161. 4 *Co.* 21, 22. *Lex Cuſt.* ch. 17. p. 153. 157. *Kitch.* 81. b. 2 *Brownl.* 43. Reyner *v.* Poell. *Coke's Copyh.* ſ. 50. *Tracts*, 116. And ſee *ante*, ſ. 2. p. 51—2.

(*e*) See *Fitzh. Abr.* tit. *Subpœna*, *pl.* 3. 1 *Co.* 88. a. and 121. b. 4 *Co.* 22. *Brooke*, tit. *Deſcent*, 36. *Dyer.* 10—11. *pl.* 40. 274. *pl.* 43. *Plowd.* 58. *Co. Litt.* 14. b. 19. b. 2 *P. Wms.* 736. But ſee 2 *Anderſ.* 146—7. *contra.* Note: See *Sanders on Uſes and Truſts*, 104—5.

(*f*) *Co. Litt.* 14. b. note (5), and ſee 2 *Atk.* 583. and 1 *Ibid.* 593.

(*g*) See 1 *Co.* 121. b. 2 *P. Wms.* 713. *Hardres*, 488—91. in 2 *Comyns's Dig.* Chancery, (4. W. 1.) *Moſeley*, 72. Penville *v.* Luſcomb.

(*h*) See 1 *Atkins*, 604. 607. Caſborne *v.* Scarf & *al.* and *Co. Litt.* 205. a. note (1). and *Moſely.* 72. Penville *v.* Luſcombe. and *ante*, 60. N. (*a*).

UPON

UPON AN ESTATE OF FREEHOLD (*i*), yet, by the exertion of certain acts of ownership, (as by granting them over for term
[86] of life,) a POSSESSIO FRATRIS of them may be made (*k*). There can be NO POSSESSIO FRATRIS of an ESTATE TAIL (*l*); nor of HONORARY DIGNITIES (*m*); but of A FEUDAL TITLE OF HONOR there MAY; for the title follows the land (*n*). So of AN OFFICE OF DIGNITY (*o*). But of the descent of THE CROWN AND ITS POS-

(*i*) *Gilb. Ten.* 15. See *Co. Litt.* 14. a. and note (6). 11. b. *Kitch. Courts*, 109. b. &c. 3 *Co.* 42. a. and b. *Cro. Car.* 411—12. Reeve & Malster. 8 *Co.* 88. b. Buckmere's case. And *post.* ch. 3. s. 1.

(*k*) 8 *Rep.* 35. b. *Co. Litt.* 15. a. 191. b. and *post.* ch. 3. s. 1.

(*l*) *Fitz. Abr.* tit. *Discent*, 8. *Plowd.* 57. 3 *Co.* 42. a. *Co. Litt.* 14. b. 15. b. *Noy's Max.* 23. ch. 4. *Brooke, Discent*, 56. *Kitch.* 109. b. See *Calth. Copyh.* 88.

(*m*) 3 *Co.* 42. a. *Co. Litt.* 15. b. And see *Shower's Parl. Cases*, 9, 10. *Visc. Purbeck's case.*

(*n*) *Co. Litt.* 15. b. note (3). *Ante*, sec. 2. p. 61.

(*o*) *Co. Litt.* 15. b. note (3).

SESSIONS

SESSIONS there can be NO POSSESSIO FRATRIS (*p*). Neither can there be a POSSESSIO FRATRIS of A RIGHT ONLY (*q*); nor of AN INCIDENT OR APPENDANCY, diſtinctly from its principal (*r*).

(*p*) *Plowd.* 245. *Co. Litt.* 15. b. 2 *Blackſt. Comm.* 233. ch. 14.

(*q*) See *ante*, ſec. 3. p. 64.

(*r*) See *ante*, ſec. 2. p. 62.

CHAP.

[87]

CHAP. II.

THE RULES OR CANONS OF DESCENT.

WHEN the property is veſted or fixed in a perſon ſo as to be tranſmiſsible to the heirs of ſuch perſon, whether he himſelf took by deſcent and acquired an actual ſeiſin of the hereditaments deſcending, or whether he took as firſt purchaſer, ſuch hereditaments ſhall deſcend to the right heirs of the perſon ſo actually ſeiſed of an eſtate of inheritance in poſſeſsion or in whom they are ſo fixed by purchaſe; or, if they are in reverſion or remainder expectant upon an eſtate of freehold, to the right heirs of the perſon creating the particular eſtate, on which ſuch reverſion is expectant; or of the perſon to whom ſuch

remainder is limited; or of him who, being an intermediate perſon, has acquired a ſeiſin (if we may call it ſuch) of ſuch reverſion or remainder by the exertion of any act of ownerſhip, which is tantamount or equivalent to an actual ſeiſin of hereditaments in poſſeſsion, according to the [88]
following

CANONS:

1. Hereditaments ſhall lineally deſcend to the iſſue of ſuch perſon *in infinitum*; but ſhall never lineally aſcend (*a*).

2. The

(*a*) As if a ſon purchaſe land, and die without iſſue, and his father or mother be then living; his father or mother ſhall *not* (as ſuch) inherit ſuch lands immediately from the ſon. But if the father or mother be alſo COUSIN to the ſon, they *may* (as ſuch) ſucceed to the inheritance. See 2 *P. Wms.* 614. Eaſtwood *v.* Vinke, *or* Styles. And ſee *Preſt. Tr.* Tr. vi. p. 78.

And if there be father and two ſons, and one purchaſe lands and die; the BROTHER ſhall take the inheritance as heir to him, although the father be living. For though the father ſeems the ſource of the inheritable blood, yet, as the ſon held the deſcending feud *ut antiquum*, it is ſuppoſed to have already paſſed him (the father); and, therefore, the deſcent between brother and

2. The male iſſue ſhall be admitted before the female.

[89] 3. Where there are two or more males in equal degree, the eldeſt only ſhall inherit, but the females all together.

4. The lineal deſcendants, *in infinitum*, of any perſon deceaſed ſhall repreſent their anceſtor: that is, ſhall ſtand in the ſame place as the perſon himſelf would have done had he been living (*b*).

5. On

and brother is conſidered as *immediate*; and in making out their title *to each other*, the common father need *not* be named: but the deſcent between them ſhall be, if he be living, exactly the ſame as though he were deceaſed. See 1 *Vent.* 423. 2 *Blackſt. Comm.* 212. and 226. ch. 14. *Hale's Com. Law.* 258 and 270. ch. 11. *Litt.* ſ. 2 and 3. *Co. Litt.* 10. a. and b. 11. a. *Wright's Ten.* 180—6. ch. 3. *Gilb. Ten.* 14.; and ſee *Godb.* 275. ca. 388.

(*b*) This right of repreſentation takes place alſo in deſcents of GAVELKIND and BOROUGH ENGLISH LAND; as alſo of COPYHOLDS in the nature of thoſe tenures. See 1 *Mod.* 102. Blackburne & Graves. 2 *Lord Raym.* 1024. Clements *v.* Scudamore. and *Robinſ. on Gavelk.* b. 1. ch. 6. p. 91—98. and *Appendix*,

5. On failure of lineal defcendants, or iffue, of fuch perfon, the inheritance fhall defcend to his collateral relations, being of the blood of the firft purchafer; fubject to the three preceding rules (*c*).

6. The

pendix, p. 11. to the end. *Kitch.* 86. a. and fee 1 *Roll. Abr.* 623. *Difc.* (A.) *pl.* 3.

But where the cuftom of a manor was exprefsly ftated to be, that the copyhold lands of every tenant *dying feized* fhould defcend to the youngeft fon, it was adjudged that it would not extend to the cafe of a *furrenderee dying before admittance*; for he was not *a tenant*; nor could he have *died feized.* See Hale's cafe cited by *Holt*, C. J. 1 *P. Wms.* 65. in the cafe of Clements *v.* Scudamore. and fee *Robinf. Gavelk.* 98.

(*c*) The cuftom of gavelkind extends to collaterals; fo that if one brother die without iffue, all the other brothers fhall fucceed. See *Rob. Gav.* b. 1. c. 6. p. 92—3.

But the cuftom of Borough-Englifh does *not* extend to collaterals; and, therefore, lands of that tenure fhall not go to the youngeft *brother* without a fpecial cuftom. See *Ibid.* 93. *Comyns's Dig.* Boro' Engl. 14 *Vin.* Heir, (F. 5.) and 1 *Durnf. & Eaft.* 466. Denn *d.* Goodwin *v.* Spray.

So if a cuftom be fpecially found that the lands of a tenant fhall defcend to, and be partible between, *all his fons*, it fhould feem that it would not extend to *all*

his

6. The collateral heir of ſuch perſon muſt be his next collateral kinſman of the whole-blood.

7. In collateral inheritances, the male ſtock ſhall be preferred to the female; *(i.e.* kindred derived from the blood of the male anceſtors, however remote, ſhall be admitted before thoſe from the blood of the
[90] female, however near;) unleſs where the lands have, in fact, deſcended from a female.

Theſe canons are already ſo ably deduced and ſo fully illuſtrated, particularly by Mr. J. Blackstone and Lord Hale, that it would be equally preſumptuous as needleſs for me to attempt ſaying any thing further on the ſubject. I ſhall therefore content myſelf with thus inſerting theſe canons, for preſerving the concatenation

his brothers if he die without iſſue: for the cuſtom is not that lands ſhall deſcend "*after the manner of gavelkind,*" but merely that they ſhall deſcend to the *ſons.* See above, Hale's caſe. and *Rob. Gav.* 38. &c. *Wright's Ten.* 212. N. (n).

nation of the work; and ſhall refer to *Hale's Hiſt. of the Common-Law*, ch. 11. and *Blackſtone on Deſcents*; and his *Comment.* vol. ii. ch. 14. *Robinſon on the Law of Inheritances in Fee-Simple* may alſo be here conſulted, with *Dalrymple, F. P.* ch. 5. p. 188. *Sullivan*, lect. xiv. p. 135. and *Wright's Ten. paſsim.* and *Eſſays on Brit. Antiq. Eſſ.* iv.

CHAP. III.

[91] OF THE DESCENT OF REVERSIONS AND REMAINDERS EXPECTANT UPON ESTATES OF FREEHOLD.

SECT. I.

Of a Mesne Seisin, &c. of such Estates.

BUT before I speak immediately to this point, I will make a few historical remarks prefatory to the subject;—they may elucidate the doctrines which will be presently deduced. And without wearying myself or wearying my readers, with looking into the pages of antiquity, I shall just give a deduction of facts, as they occur to my memory, and refer to a few writers, and those chiefly of a recent date; not for the purpose of establishing such facts, (for then perhaps more proper authorities might

might be vouched,) as I think the reader's own recollection will confirm and bear testimony to what he finds; but because he may, in the books referred to, meet with observations more illustrative of the subject, and more worthy of his attention and trouble. [92]

The *dominium directum* originally in the state.

At an early age, at the dawn of the feudal system, the ultimate property, or *dominium directum* of the lands, seems to have been in the nation or society at large. Indeed it must have required a length of time to have arrived at this state of refinement; yet it certainly is no more than what we find many states which we deem barbarous, and even savage, have attained to (*a*). However, at the age I speak of, and in several countries of Europe, the abstract idea of society, or the

(*a*) See *Sullivan*, Lect. iv. p. 36. *Stuart's Diss. Ant. Eng. Const.* pt. 1. s. 3. and *View of Soc. in Eur.* 24. 151. 201. 213. 4to edit. *De Lolme on the Const. of Eng.* b. i. c. i. p. 10—11. edit. 1789. See *Linschoten*, b. 2. *p*. 219. 221. *Lamb. Observ. As. Af. and Am.* vol. i. ch. 20. p. 205. *Ferguson on Civ. Soc.* part 2. s. 2. p. 124. and *Aristotle*, Pol.

public, prevailed, and the abſolute property of the ſoil was ſuppoſed to belong to ſuch ſociety at large. Among the ancient Germans we find the cuſtom of dividing the lands annually among the freemen, while the ultimate property therein ſeems to have been lodged in the tribe. As ſociety, therefore, was an abſtract idea, it was requiſite to have a corporeal repreſentative, in whom certain properties attributed to ſuch ſociety ſhould be veſted. Hence aroſe the chief political perſon of the ſtate.

[93]

Several ſmall clans form a nation.

In thoſe early times a ſtate conſiſted of a number of petty clans or hordes, the individuals of each of which were more immediately ſubject to a particular chief, who led them to war, and who preſided over them in peace, in a civil capacity, as their magiſtrate. But when a cauſe aroſe between the chieftains, or any of the individuals of the ſeveral clans, they muſt have had recourſe (when the contention was not decided by the ſword) to an higher tribunal, which had authority over each. As ſeveral of theſe petty diſtricts formed a ſtate,

ſtate, each was ſubject to the general control: but as every freeman was thus amenable to the acts of ſuch ſociety, every freeman had a ſeat in the ſupreme aſſembly. Theſe aſſemblies met at certain ſtated times, or upon ſome preſsing [94] emergency, and framed rules, &c. for the direction of the ſtate. Thus was the ſupreme authority veſted in the aggregate of freemen; and thus was it to continue.

And elect a general monarch or chief.

But it was neceſſary, on many occaſions, to delegate a portion of ſuch power to particular individuals: and therefore, we find that over theſe rude ſtates a monarch or king was generally elected to preſide, though with very limited authority. And when a war was determined on, or an invaſion impended, as a leader or chief was requiſite to conduct the united clans, ſuch king led them to battle: or, in caſe the cauſe was not a general one, and only a particular clan, or a few of ſuch diſtricts were concerned in the enterprize, or the monarch declined leading them himſelf, or in caſe ſeveral ſtates united in a general war, they elected a chief for the purpoſe

Pro tempore. of conducting them: but, as that purpose was frequently the only one for which he was elected, when the war determined, [95] his authority ceased, and he descended to his pristine station (*b*).

Civil magistrates. Again, as to the civil government, a certain portion of authority was delegated to magistrates, who, deriving their power from the society at large, were not confined to a particular clan or family, but enabled to decide those causes which arose

(*b*) See *Versteg. Rest. Dec. Intel.* c. 3. p. 68. See it also in *Speede's Chron.* b. 7. c. 3. s. 10. p. 290. and in 1 *Tyrr. Gen. Hist. Eng.* Introd. xxxix. See *Nor. Ant.* vol. i. c. 4. p. 61. c. 8. p. 158. 168. *Bick. Alf.* 1. 11. 41. 1 *Tyrr. Hist. Eng.* b. 2. p. 33. b. 3. p. 116. b. 5. p. 254. *Camd. Brit. Introd.* (Engl. Saxons.) *Mod. Univers. Hist.* vol. xlii. p. 2. See *Hottom. F. G.* ch. 1. 6. 10. *Verst.* c. 10. p. 349. *Speede*, b. 5. c. 6. p. 173. b. 7. c. 1. p. 282. See *Loc. on Gov.* b. 2. s. 102. 106. 108. &c. *Adair's Am. Ind.* 428. 435. And *Leo's Afric.* *Falc. on Climate*, &c. b. 4. c. 2. p. 228. *Sullivan*, lect. iv. p. 30. And *Ferguson on Civil Soc.* part 2. s. 3. p. 152. 1 *War. Wales*, b. 1. p. 4. 42. b. 2. p. 119. b. 3. p. 132. 136. b. 4. p. 246. *Stuart's Diss. Eng. Const.* part 3. s. 2. p. 132. *Roberts. America*, vol. ii. b. 4.

between

between the individuals of ſeparate diſtricts, or between the lord or chief and the particular perſons who were immediately ſubject to him, in order to ſecure to the individual that impartial adminiſtration of juſtice which ſociety was inſtituted to confer. Theſe magiſtrates, thus choſen, [96] were generally ſuch men whom experience had taught wiſdom, and whoſe underſtanding was ripened by age. Hence the titles of them, in moſt ancient nations, were thoſe of the elders, aldermen, ſenators, fathers, ancients (c), &c. which were expreſsive of this qualification. The number of theſe magiſtrates was different in different ſtates: But we may remark, that they continued elective by the people long after the chieftainry became hereditary; and many continue ſo among us to this day.

Thus were the chiefs and the civil magiſtrates elected by the ſociety, while the

(c) So the title of *Sheikh*, among the Arabs, ſignifies *an old man*. See *Journal from Aleppo to Damaſcus*, p. 6. note (*f*).

4 freemen,

freemen, conſtituting the nation, reſerved the ſupreme power to themſelves. When a war threatened, when magiſtrates were to be choſen, or when the lands were to be apportioned out to the individuals entitled, the ſubject was debated and determined on in the general council or aſſembly. The council or aſſembly appointed the portion of ground to the ſubject; they choſe their magiſtrates; and, when unity of action was more immediately requiſite, when the aſſembled army was to be conducted, they nominated an individual to preſide and to direct the belligerent clans. This, or ſomething very ſimilar to this, ſeems to have been the manner of government among our German anceſtors (*d*), from very early times, and to have continued among them till their leaving their natal dwellings, with very ſmall alteration. The government of the Saxons, while on the continent, is thus deſcribed: "They "ordained twelve noblemen, choſen from "among others, for their worthineſs and "ſufficiency. Theſe, in the times of

General aſſembly.

[97]

Saxon government.

(*d*) See *Tacitus*, *Of the Manners of the Germans.*

"peace,

"peace, rode their ſeveral circuits, to ſee "juſtice and good cuſtoms obſerved; and "they often, of courſe, at appointed "times, met all together, to conſult and "give order in public affairs. But ever "in time of war, one of theſe twelve was "choſen to be king, and ſo to remain ſo "long only as the war laſted; and that "being ended, his name and dignity of "king alſo ceaſed, and he became as be- [98] "fore. And this cuſtom continued among "them till the time of their wars with the "emperor Charles the Great;" when "the "mutable title of king" became hereditary (*e*).

Armies electing chiefs or kings.

As every freeman that was not incapacitated by ſickneſs, age, or other corporal or mental diſability, was a *ſoldier*, and their armies thus conſiſted of their whole people, we often find their armies electing their kings. Indeed, as their general aſſemblies were compoſed of the ſame

(*e*) See *Verſtegan's Reſtit. of Dec. Intell.* ch. 3. p. 68—9. and 1 *Rapin. Hiſt. Engl.* 76. 8vo. edit. and v. 2. p. 140.

perſons,

persons, (for the most part at least,) and each attended in his armour, they may be considered in the same light. Hence their custom, upon the election of a king, of placing him upon A SHIELD, and carrying him around the army; and amid the general shouts and acclamations of the people, proclaiming him their leader or
[99] king (*f*). When, indeed, they had chosen out their individual, we sometimes find them setting him up upon A GREAT STONE in the view of the people, and thus hailing him their king (*g*). We have yet the reliques of these customs: we *chair* our representatives in parliament, &c. And the stone which Edward the first brought with him out of Scotland, and to which the Scots paid the highest veneration, and

(*f*) See *Hottom. F. G.* ch. 4. and 6.; and see *Volt. Spir. of Nat.* vol. i. ch. 13. p. 124. (8vo. edit.) *Stuart's View*, 283. *Diss.* part 3. s. 2. p. 152. note (27). and see 1 *North. Ant.* c. 8. p. 170. *St. Remy. Mem. liv. i. an.* 418. p. 32. *liv.* ii. *an.* 510. p. 154. *tom.* 1.

(*g*) See *North. Ant.* vol. i. ch. 8. p. 168. vol. ii. p. 45. N. (c). *Camb. Brit.* Customs of the Irish. And the references in next note (*h*).

is

is now placed in our coronation chair, ſeems a veſtige alſo of the latter uſage; it having been appropriated for that purpoſe; their kings being ſeated on it, from very remote times, when they received their inauguration (*h*).—But to return.

When theſe northern warriors ruſhed forth to conqueſt, and poured out their forces over the branches of the empire;

> "When Rome, with heavieſt ſound, a giant ſtatue
> "fell (*i*),"

they neceſſarily had their particular leaders or captains. And when they had ſettled in the countries they thus acquired, ſurrounded by enemies yet unſubdued, and intermixed with the native inhabitants, who were generally formidable enough to preſerve their fears, and often to endanger their ſafety, a permanent captain, general, or king, over the particular clans which [100]

The kingly office * becomes for life.

* "Yt ys *an office*," ſays *Sir J. Forteſcue, On Mon.* c. 8. p. 55. and *Vide*, 1 *Marine. ſt.* 3. *c.* 1. *ſ.* 3.

(*h*) See 3 *Tyrr. Hiſt. Eng.* b. 9. p. 96. *anno* 1296. *Supplem. to Mod. Univ. Hiſt.* vol. xli. c. 1. p. 16. and 85. vol. xxxix. p. 204. *Camb. Brit.* tit. *Scone.*

(*i*) See *Collins' Ode to Liberty.*

ſettled,

ſettled, was requiſite. In the Saxon period, there were ſeven ſeveral ſtates or kingdoms eſtabliſhed in this iſland, which had their reſpective perpetual chieftains or kings: but as theſe ſeven ſtates formed alſo one general ſociety, a general monarch was alſo choſen (*k*).

The king repreſents the nation as to the military power.

When the chief repreſentative of the ſtate, or of the particular kingdom, became permanent, and when the military capacity and returns were, from the continual wars which in thoſe times prevailed, ultimately concentred in him as their chief, it was an eaſy tranſition to ſuppoſe that the individual held his lands of him to whom he owed his ſervices; and, more eſpecially, as the idea of hereditary ſucceſsion was then partly received, and, conſequently, the chief ſeemed more ſelf-ſubſiſtent than when elected for a tranſient cauſe.

And as to the property in lands.

[101]

(*k*) See *Camb. Brit.* Introd. p. cxxx—i. *Speed.* b. 7. c. 4. p. 293. 1 *Tyrr.* b. 5. p. 254. *Bick. Alf.* 41. *Mill. View Eng. Gov.* b. 1. c. 3. p. 52. *Bac. on Gov.* b. 1. c. 16. *Squire*, ſ. 28. and N. (1). ſ. 29. and N. (1). ſ. 66. N. (2). ſ. 75. and N. (1). 1 *Rap. Eng. Hiſt.* 149. 8vo. edit. and vol. 2. p. 140. &c.

cause (*l*). As he thus represented society as to the military power, it was imagined that he represented it also as to the property of the lands. Hence was it said, that the ultimate property was vested in him, and that the subject held his feud of the king. Not, indeed, that the king then, or ever since, could be supposed, individually, the ultimate proprietor of the soil any further than as the representative of the society at large: this is evident, were it needful to urge any proof other than that it carries in itself, from the demesne lands of the king: these, in the times of the Saxons, were considered as the lands of the nation, and unalienable by him without its express consent (*m*). The king's demesnes.

Among

(*l*) See *Stuart's Diss. on the English Con.* pt. 2. s. 1. p. 77. and note; and pt. 3. s. 2. p. 132. The author had not read this valuable work when he wrote the text of the present pages; though he has since made frequent references to it in the notes.

(*m*) When the king had a power of granting feuds, the demesnes were necessarily alienable, as they were the fund which supplied those grants; but yet, when the demesnes were reduced so far as to be scarcely sufficient for his support, the nation interfered, and pre-

3 vented

[102] Among the ancient Germans, we have seen that the lands were portioned out to the

Feuds distributed annually.

vented any further reduction. See *Mill. View*, &c. b. 1. c. 7. p. 148. and 157. *Stuart's View of Soc. in Eur.* b. 1. c. 2. s. 1. p. 26—8. 1 *Tyrr.* Introd. p. lxviii. and p. 257. *Sub. An.* 836. And see 2 *Spir. of Laws*, b. 31. c. 7. p. 430. *F. N. B.* 14. D. and *Stuart's Diss.* part 3. s. 2. p. 144.

These demesne lands formed the chief part of the revenue of our ancient kings. William the First had, it is said, 1422 manors, beside other lands. His annual revenue, nearly four (some say nine or ten) millions of our present money. Henry VI. had nearly one-fifth of the kingdom in value. See *Sulliv.* 172. *Mod. Univ. Hist.* vol. xxxix. p. 61. *Fortesq. on Mon.* ch. 11. p. 82.; and see *Essay on the Polity of Eng.* 8vo. p. 459. note (z). *West on Peers*, 24.

De Lolme conceives that it is in consequence of the king's being considered as THE UNIVERSAL PROPRIETOR OF THE KINGDOM that he is deemed directly concerned in *all offences*; and that *for that reason*, PROSECUTIONS ARE TO BE CARRIED ON IN HIS NAME IN COURTS OF LAW. *Const. of Eng.* b. 1. c. 5. p. 72. (edit. 1789.)

But, with great respect to *M. De Lolme*, I must beg leave to say, that the circumstance of prosecutions for criminal offences being carried on *in the name of the king* does *not* appear to be the consequence of his being "looked upon *as the universal proprietor* of the kingdom." For "the fiction" of his being so considered is

the individual every year; when they returned again to the ſtate. To have given them [103]

is founded upon *feudal* principles *relative to the idea of* PROPERTY, *and not to that* OF CRIMES: for what has the univerſal proprietorſhip of *this* kingdom (for we are not ſpeaking of *Japan*. See *Spir. of Laws*, b. 6. c. 13. p. 124. 8vo. ed.) to do with the puniſhment of criminal offences? But that it is in conſequence of his being *the repreſentative of ſociety* AS TO THE EXECUTION OF ITS LAWS, *or* HIM IN WHOM THE EXECUTIVE POWER IS LODGED, that ſuch proſecutions are carried on in HIS name. All offences of ſuch a nature are injurious to ſociety; ſociety therefore muſt puniſh them: but as ſociety is a mere *ens rationis*, an abſtract idea, it muſt be *repreſented* in order to puniſh: And, as to the EXECUTIVE POWER of ſociety, THE KING is, in this nation, the repreſentative of it; and, *therefore*, all proſecutions for crimes are carried on in his name.

This idea ſeems neceſſary to ſociety, and to have been well underſtood in moſt, if not all ſtates; even in thoſe which are rude—as among the natives of Africa, Aſia, and America: we find it among the ancient Britiſh, Iriſh, Germans, &c. &c. See *Leo's Afric.* b. 3. p. 162. fol. *Adair's Amer. Ind.* 145. *Lamb. Obſ. Aſ. Af. and Am.* vol. i. ch. 11. p. 117, 118. *Spir. of Laws*, b. 6. c. 5. and c. 13. See *Lord Kaims's Tracts*, tr. 1. p. 40. *Stuart's View of Soc. in Eur.* b. 1. c. 2. ſ. 3. p. 27. and 254. 39, and 256. *Falc. Clim.* b. 1. c. 18. ſ. 4. and N. *Nor. Antiq.* vol. i. c. 8. p. 187. *Whit. Manch.* vol. i. c. 8.

[104] them for a *longer* time would have been dangerous to their military avocations; would

c. 8. p. 378. *Bacon on Eng. Gov.* part 1. c. 40. fol. 1 *Tyrr. Hist. of Eng. Introd.* p. 126. *Camb. Brit.* p. 1043—4. note. See *Eunomus*, vol. iii. p. 289. and vol. iv. p. 193. *Law of Forf.* 102. 111. and note. And see *Beccaria on Crimes*, and *Eden's Princ. of Penal Laws.*

Solon, to the question, "Which is the most perfect popular government?" answered, "*That*, where an "injury done to any private citizen is such to the whole "body." The whole body therefore should punish; but it should punish by THE REPRESENTATIVE OF ITS PUNITORY POWER.

Among our Saxon ancestors, a *fine* was imposed on all criminal offences, even down to that of *ederbrece*, or, as we now term it, "breaking the close or fence;" (*quare clausum fregit*; see 3 *Bla. Comm.* c. 12. p. 209—210.) The fine for which was, by a law of Alfred, fixed at five shillings.

And with us, at this day, all offences denominated *crimes* are considered as offences against the public or society, and prosecuted by *the crown:* and for all such crimes, down to the lowest trespass *vi et armis* to the individual, a *fine* or forfeiture is, in strictness, due. See 1 *Blackst. Comm.* c. 7. p. 268. 3 *Ibid.* c. 8. p. 118. 138. 2 *Hawk. Pleas of the Crown.* c. 2. s. 3. *Sir Tho. Smith's Com. Wealth of Eng.* b. 2. c. 10. and 14. 3 *Co.* 12. a. *Burton's Excheq.* vol. i. p. 407. and vol. ii. p. 277. 8 *Rep.* 59. b. 60. a.

So

would have diverted their thoughts and care too much to agriculture and the arts. [105] Agriculture and the arts.

So whatever affects THE PUBLIC; as nuisances, restraints of trade, &c. Thus a dyer was bound that he should not use "his craft" for two years; and HULL held, that the bond was against the common-law:—"And, by G—d, (said the old Judge,) if the plaintiff "were here, he should go to prison *till he had paid a* "*fine to the king.*" See 11 *Rep.* 53. b. *Year-book, Pasch.* 2 *Hen.* 5. *f.* 5. b. *pl.* 26. *Fitzh. Abr. Impris. pl.* 14.

All *crimes* or offences of a *public* nature are therefore *indictable* at the suit of the king, as the king is the representative of the public as to the execution of the laws; and *an indictment* is said to be HIS *suit:* but for whatever is of a *private* nature, the offender is only punishable *at the suit of the person injured.* See 2 *Hawk. P. C.* c. 25. s. 3, 4. 4 *Comm.* c. 15. p. 218.; and 3 *Com. Dig.* 504—6. Indictment, (D.) and (E.) Information, (B.) p. 520.; and see 4 *Bla. Comm.* c. 1. p. 2. 2 *Strange*, 788—92. Rex *v.* Curl. 3 *Burr.* 1698. Rex *v.* Storr. *Ibid.* 1706. Rex *v.* Atkins. *Ibid.* 1731. Rex *v.* Bake & *al.*

Though THE KING is, in this nation, considered as its chief magistrate; (see 2 *Hawk. P. C.* ch. 1. s. 1.) yet he has delegated his JUDICIAL POWER wholly to his Judges (unless it be when he is considered as presiding in his supreme court of parliament, (See 12 *Co.* 63. *Case of Probibitions del Roy.*) or upon appeals). To suppose him to be at once the prosecutor and judge would be absurd: (See 1 *Spir. Laws*, b. 6. c. 5.; and

 2 *Hawk.*

[106] arts (*n*). But yet agriculture was necessary; and therefore they were *annually*

2 *Hawk. P. C.* ch. 1. ſ. 2.) And was he to be a Judge in any other ſuit, it would preclude an appeal: for to whom can we appeal from ſupremacy itſelf? "But (ſays the celebrated FATHER PAUL) appeals are neceſſary; as it would be tyranny to ſubject any one to the opinion of a ſingle judge, who might thereby oppreſs him at will. Sovereign princes, therefore, (he adds,) do not paſs ſentence themſelves, that the perſons condemned may have the benefit of appeals." (See *his Rights of Sovereigns*, c. 3. p. 45—51.)

And although the court of KING'S BENCH be conſidered as *peculiarly* the KING's court, he being ſuppoſed to ſit there in perſon, as he once actually did: (See 2 *Burr.* 851—2. *Sulliv.* 300. lect. 32. *Dalrymple*, 275. See *Squire*, p. 182. N. (1). 1 *Rob. Cha.* V. ſ. 1. p. 370. (z). In Scotland the king ſat in perſon ſo lately as the reign of James VI. *Dalrymple, F. P.* 284. See *Kaims's Tracts*, 299. 300.) and the ſtyle of the court ſtill being *coram ipſo rege:* (See 3 *Bla. Comm.* c. 4. p. 41.) yet the judges of "the court" give the judgment, and not the king. And therefore a writ of error lies from this court into that of parliament: yet this does not involve in it the abſurdity of an appeal to a ſuperior power than that of the king himſelf; for ſtill it is *to* HIM *in parliament:* and not under an idea that the houſe of lords is, in ſuch judicial capacity, ſuperior to the monarch, who is himſelf the fountain of juſtice. (See 12 *Rep.* 64—5.)

(*n*) *Vide Cæſ. de Bello Gall. lib.* vi. c. 20. See *Lowman on the Civil Gov. of the Hebrews*, c. 4. p. 56. 2 *Bla.*

ally afsigned (*o*). To give them for a *lefs* time would not have afforded them an opportunity to have gathered the fruits of their labours—to have reaped what they had fown. But when they had acquired lands in the ftates they had conquered; when they had obtained the habitations they were compelled to feek; when the [107] turbulency of the times permitted, and the blefsings of agriculture, and of the remnants of the arts which they difcovered among the people they had fubdued, had excited them to feek more permanent dwellings, they required interefts of a

2 *Bla. Comm.* 55. c. 4. and *Stuart's Diff.* part. 1. fec. 3. *Falc. Clim.* b. 6. c. 1. f. 1. p. 272. and N. *. *Squire*, f. 14, 15, 16. *Davys*, 34. a. 49. b.

(*o*) Among the *ancient Irifh* the divifion of lands was ufually made on the death of each tenant. See *Davys's Rep.* 49. &c. *Stuart's Diff.* part 1. f. 3. p. 35. N. (12). and *View of Soc. in Eur.* b. 1. c. 1. f. 1. p. 152. N. (1).

So that they were continually changing their fituation. See *Davy's*, 34. a. 49. &c. *Stuart's Diff.* 32. N. (8). *View*, 24. 251.

In *Peru* the lands were allotted annually. 2 *Rob. Amer.* b. 7. p. 312. (4to. ed.)

 longer

longer duration; and the reaſon for their *annual* change of ſituation had now, in a manner, ceaſed.

Eſtates at will.

It is not to be ſuppoſed, that perſons uſed to *annual* poſſeſsions would have been contented with *eſtates at will* (*p*). And as they came over with a view of obtaining "a local habitation," it is moſt probable that the Saxons, &c. who then ſhared the conquered lands, had each an intereſt of a *longer*, and not of a *ſhorter* duration. Thoſe, indeed, who then ſo obtained lands, might have dealed them out again to their followers or relatives, &c. for a *leſs* eſtate—for a year or at will. But, however, it ſeems pretty clear, that ſoon after their ſettlement in the conquered ſtates, feuds became for the *life* of the feoffee or donee. And, ſince the completion of that celebrated ſyſtem in this iſland by William the Firſt, if not long prior to that event, an eſtate FOR LIFE, either of the donee or of ſome other perſon, ſeems to have been thought the *leaſt* eſtate which

Feuds become for life.

[108]

(*p*) See *Sullivan's Lect.* lect. 5. p. 50. (2d edit.)

a ſoldier,

a ſoldier, or freeman, could accept of, as ſuch, in a *feudal* or *military* capacity.

But though the tenant had an eſtate for life, or in fee, ſtill the ultimate property was conſidered as veſted in the king, and the tenant had but the *dominium utile*, or the right of poſſeſsing or enjoying the lands ſo given. The POSSESSION of the land was in him who had ſuch intereſt FOR LIFE, or ſome GREATER ESTATE, but could not be in him who had a LESS intereſt. Hence LIVERY OF SEISIN was neceſſary at the creation or transfer of an eſtate of FREEHOLD; but was *not* given on the creation of a LESS eſtate. The FREEHOLDER had the FEUDAL POSSESSION; and if he had granted his eſtate for years or at will, yet *his* poſſeſsion was ſtill conſidered as exiſting; and the enjoyment of the leſſee was that of the leſſor: the leſſee being conſidered in no other light than as the bailiff or ſervant of the freeholder, and accountable to him for the profits of the lands at a certain and ſtated ſum (*q*). And hence alſo is it, that no [109]

Dominium utile.

Seiſin in the freeholder.

Livery of ſeiſin.

Gilb. Ten. 13.

Leſſee for years the bailiff of the freeholder.

(*q*) See *Mill. View of Eng. Gov.* b. 1. c. 5. p. 86. *Gilb. Ten.* 30—49. *Co. Litt.* 239. b. note (2); and 331.

no other is ſaid to be SEISED of property in lands but he who has a FREEHOLD eſtate. He who is A LESSEE is only ſaid to be POSSESSED; and that not properly of the *land*, but of *the term of years* (*r*). He, therefore, who has A FREEHOLD is ſaid to be SEISED, and to have THE FEUDAL POSSESSION; and, *e converſo*, he who has the SEISIN, OR FEUDAL POSSESSION, has the FREEHOLD; for ſuch is the definition of A FREEHOLD ESTATE (*ſ*).

Freehold and chattel intereſt.

And hence ariſes the diſtinction in our law between A FREEHOLD and A CHATTEL INTEREST: As the poſſeſsion of the leſſee is that of the leſſor, THE FEUDAL SEISIN remains IN THE TENANT OF THE FREEHOLD; and if he has a deſcendible eſtate, it will devolve on his death to HIS OWN heirs, as of the perſon LAST SEISED: but [110] if the *deſcendible* eſtate be EXPECTANT

331. a. N. (1). 2 *Blackſt. Comm.* 141. ch. 9. *Gilb. Hiſt. Feud. MS.* p. 49—50.

(*r*) See 2 *Bla. Comm.* 144. c. 9.

(*ſ*) See *Ibid.* 104. c. 7. and the authors their quoted and referred to; and *Co. Litt.* 230. b. note (1).

UPON

UPON A PRECEDENT FREEHOLD, the FEUDAL SEISIN is in ſuch PRECEDENT TENANT; and, conſequently,

Reverſion on a freehold, Not ſubject to *poſſeſſio fratris.*

There can be NO MESNE SEISIN *of a* REMAINDER OR REVERSION *expectant upon an eſtate of* FREEHOLD, ſo as to make a POSSESSIO FRATRIS (*t*), while ſuch remainder or reverſion continues in a regular courſe of DESCENT (*u*).

But as ſuch remainder or reverſion may be ſold, deviſed, or charged, by the perſon entitled to it (*x*), the deſcent of it may

(*t*) See *ante*, c. 1. ſ. 4. p. 85.

Nor ſhall the *deſcent* of ſuch remainder or reverſion take away an entry, or put him who has right to his action. *Co. Litt.* 239. b. 243. a. 244. a. *Noy's Max.* 35. ch. 16. *Finche's L.* b. 2. c. 3. p. 120. 1 *Co.* 134. b. 8 *Co.* 101. b. *Gilb. Ten.* 22.

(*u*) For if it be granted over, it veſts immediately in the grantee; and makes *him* the ſtock of deſcent: and, in ſuch caſe, the perſon afterwards claiming by deſcent, muſt make himſelf heir *to ſuch purchaſer*. See *Hale's Comm. Law*, 269. ch. 11.

(*x*) *Brooke, Diſc.* 30. *Eſtates*, 24. 40. *Scire Facias*, 126. *Co. Litt.* 14. b. and N. (4). 309. a. 2 *Bla.*

may be changed by the exertion of certain acts of ownerſhip; as by granting it over for term of life, or in tail (*y*).

For the exertion of ſuch acts of ownerſhip is equivalent to the actual ſeiſin of an eſtate which is capable of being reduced into poſſeſsion by entry. For, as an actual entry is not practicable in the caſe of ſuch reverſion or remainder, the alienation of them for a certain eſtate is ſufficient to turn the deſcent: ſuch grants being (before the ſtatutes 4 & 5 *Anne. c.* 16.) always attended with attornment, the notoriety of them and the conſequent alteration of the tenant, were deemed equal to the actual entry on a deſcent, or livery of ſeiſin on a gift or ſale of an eſtate in poſſeſsion; ſuch attornment being originally *coram paribus*, and in later days

2 *Bla. Comm.* 175. 2 *Co.* 61. a. *Perk. S.* 88. *Kitch.* 153. a. *Touchſt.* 238. 242. 253. 1 *Veſ.* 175. 177. Cunningham *v.* Moody. 2 *Atk.* 206. Kinaſton *v.* Clarke. *Gilb. Rents*, 23.

(*y*) See *ante*, ch. 1. ſ. 3. p. 73. and ſ. 4. p. 85.

ſufficiently

ſufficiently atteſted (*z*). And for this reaſon, a reverſion could not be granted over to take effect *in futuro* any more than an eſtate in poſſeſsion (*a*).

Thus where A. was tenant for life, with remainder to truſtees for preſerving contingent remainders, with remainder to the firſt and other ſons of A. in tail, with remainder to the heirs of the body of A., with remainder to the right heirs of the father of A. (who was the deviſor); and A. made a leaſe and releaſe to B. in truſt for the payment of his debts, &c. and levied a fine of the lands but ſuffered no recovery; it was held by Lord HARDWICKE, that A., by ſuch conveyance, had altered the courſe of the deſcent of the reverſion, ſo that it ſhould go to the heir of A. of the whole-blood (*b*).

(*z*) See *Plowd.* 25. 152. *Gilb. Ten.* 81. *Co. Litt.* 309. a. *Touchſt.* 253. *Sulliv. Lect.* 119. 2 *Bla. Comm.* 317.

(*a*) *Plowd.* 155. 483. 8 *Co.* 74. *Brooke, Grants,* 60. 2 *Bla. Comm.* 165.

(*b*) 9 *Mod.* 363. Stringer *v.* New.

And

And this principle, that a remainder or reverſion on a freehold will admit of no meſne ſeiſin, while it continues in a courſe of deſcent, and ſuch acts of ownerſhip have not been exerted, preſents a ſolution of the queſtion, Whether a remainder or reverſion on a freehold ſhall be ſubject to the debts of the *meſne* remainder-man or reverſioner?

In Robinſon *v.* Tonge (*c*), it is ſaid of an advowſon, that "as it may be ſold, and comes to the heir by deſcent, it is reaſonable it ſhould be aſſetts."

Now, though a remainder or reverſion on a freehold may be ſold, yet it may not come to the heir by deſcent from the very perſon who contracted the debt: And therefore, a diſtinction ſhould be made between extending it in the debtor's life-time (as he has power over it), or in the hands of his deviſee (as the remainder or reverſion is deviſable, and the deviſee claims under him who contracts the debt).

(*c*) 3 *Pr. Wms.* 401.

And it ſhould ſeem that, if judgment be had in the debtor's life-time, it will bind the property, though no execution be taken out till the property deſcend to others: But where no judgment be had in the debtor's life-time, and the ſtock of deſcent be not changed by ſuch meſne, it ſhould ſeem that the perſon taking ſuch remainder by deſcent would *not* be ſubject to the debts of a *meſne* remainder-man or reverſioner; as he would not take by deſcent from *him*, but from the original donor; and ſo paramount the meſne's charges (*d*).

But if no ſuch act of ownerſhip be exerted by the meſne remainder-man or reverſioner; or if ſuch remainder or reverſion be not taken in execution for the debt or other act of the meſne owner; ſuch remainder or reverſion cannot be

(*d*) See *Bro. Aſſets*, *pl.* 19. and ſee alſo 1 *Brow. C. C.* 240. Marchioneſs of Tweedale *v.* Earl of Coventry & *al.*

ſubject

ſubject to *poſſeſsio fratris*, dower (*e*), or curteſy (*f*).

Reverſion on an eſtate tail.

[112]

And, therefore, if land be given in tail, and the reverſion in fee-ſimple deſcend or come to the tenant in tail, yet, during the eſtate-tail, he cannot be ſeiſed of ſuch reverſion ſo as to make a POSSESSIO FRATRIS: As where a perſon, having iſſue a ſon and a daughter by one wife, and a ſon by another, gave his land to his eldeſt ſon in tail: the father died, and the fee deſcended to the eldeſt ſon, who afterwards died without iſſue: and it was held, that the youngeſt ſon ſhould have the land, and not the daughter, by reaſon that it was in reverſion, and not veſted in poſ-

(*e*) *Bro. Eſtates*, 67. *Fitz. Abr. Dower*, 55. 166. 8 *Co.* 96. a. *Perk. S.* 315. 317. 330. 340. 445. *F. N. B.* 150. A. *Finche's Law*, b. 2. c. 3. p. 125. *Cro. Eliz.* 316. Cordal's caſe. *Co. Litt.* 31. a. 32. a. and b. 35. a. and b. *Kitch.* 160. b.

(*f*) *Bro. Ten. par le Curteſy*, 4. 10. *Perk. S.* 467. *Dyer*, 357. *pl.* 44. *Co. Litt.* 29. a. and b. *Finche's L.* b. 2. c. 3. p. 125. *Kitch.* 159—160.

ſeſsion

ſeſsion in the eldeſt ſon, during the eſtate-tail: as it is a POSSESSIO FRATRIS which makes the ſiſter to inherit, and NOT a [113] REVERSIO FRATRIS(*g*).

Thus,

(*g*) *Brooke*, *Deſcent*, *pl.* 13. 30. *Scire Facias*, 126. *Eſtates*, 6. *Garde*, 87. *Fitz. Abr. Deſcent*, *pl.* 5. 9, 10, 11. *Aſſize.* 327. *Dyer*, 89—90. *pl.* 1—6. and 325. *pl.* 38. *Kitch.* 109. a. 110. a. 153. See 3 *Co.* 42. a. *Dyer*, 325. *pl.* 38. *Plowd.* 230. *Co. Litt.* 11. b. 14. a. and b. 15. a. 191. b. *Perk.* ſ. 88. *F. N. B.* 196. K. 220. D. *Noy's Max.* 23. ch. 4. *Carth.* 126. Kellow & Rowden. *Gilb. Ten.* 13. 1 *Veſey*, 174. Cunningham *v.* Moody. And ſee the caſe of *Jenkins on demiſe of Harris and wife againſt Prichard and others*, in 2 *Wilſ.* 45. And note, that that caſe is miſ-reported in *Wilſon*: as it was really determined, it directly ſupports the doctrine here laid down. *It was determined in favour of the daughter by the ſecond ventre.*

Indeed, the facts as ſtated in *Wilſon*, (and which are there truly ſtated,) together with the reaſoning of the court, muſt have led to this concluſion; and the judgment is moſt evidently miſtated or wrongly printed.

In a note of this caſe, as taken by Mr. Serjeant Hewitt when in court on the argument, the adjudication is thus given:

Jenkins on demiſe of Harris and wife, *againſt* Prichard and others. } In this caſe it was clearly agreed, that by the ſettlement of 1716 David Smith was tenant for life; his wife was tenant in tail, with the reverſion in David Smith.

And

Thus, while the eſtate-tail continued, he could not be ACTUALLY SEISED of the reverſion

And thereupon two points were made.

1ſt. Whether that reverſion in fee deſcended upon the two daughters of David, viz. Elizabeth by his firſt wife, and Ann by his ſecond wife, in ſuch manner as that upon the determination of the eſtate-tail, which deſcended upon Elizabeth, and from her upon her ſon, and expired by his death without iſſue, it ſhould go in moieties, viz. one moiety to Ann, and the other to the heirs of Elizabeth? or, whether it ſhould not go all to Ann as heir to her father, who was laſt actually ſeized of the reverſion?

2dly. Whether an actual entry was not neceſſary to have been made by the leſſors of the plaintiff before the bringing of this ejectment, in order to avoid the fine levied by Job Gilbert and his wife?

As to theſe two points, upon full argument, the Judges were of opinion:

1ſt. That though the reverſion deſcended upon the two daughters of David on his death, yet they were not actually ſeized of that reverſion during the continuance of the eſtate-tail, but the ſame was expectant thereon. And as whoever takes by deſcent muſt take as heir to him who was laſt actually ſeiſed, therefore Ann took the reverſion wholly as heir to her father. And as to this, 1 *Inſt.* 14, 15. and *Kellow* and *Rowden* in *Carthew* and *Shower*, were held to be authorities in point.

2dly. The

reverſion in fee-ſimple, ſo as to turn the deſcent; for he could not be ſeiſed of *both* in poſſeſsion at one and the ſame time; and an eſtate-tail will *not* merge in a fee(*h*). But had he become TENANT AFTER POSSIBILITY OF ISSUE EXTINCT, it would have been otherwiſe. For though, as to ſome reſpects, the eſtate-tail may be ſaid to have continued after poſsibility, &c. in the tenant during his life; yet, in other reſpects, it in a manner ceaſed, and the te- [114]

Apres Poſſibilitie.

2dly. The Judges held that as this fine was ſtated in the caſe to be a fine without proclamations, an actual entry was not neceſſary to avoid it; and that they would not carry the neceſſity of an actual entry to avoid a fine one jot further than it had been carried in the caſe of Dormer and Forteſcue, which was on a fine with proclamations, and not on a fine merely at common-law without proclamations, as this was:

Wherefore the *poſtea* was delivered to the plaintiff.

And that ſuch was the judgment in this caſe the Author of this Eſſay was alſo aſſured by a ſon of the perſon under whom the defendants claimed, and who, in conſequence of ſuch deciſion, refunded the meſne profits of the eſtate in queſtion.

(*h*) *Plowd.* 230. 296. 2 *Co.* 61. a. 8 *Co.* 74. b. 75. a. *Kitch.* 153. &c. *Perk.* ſ. 88. 2 *Bla. Comm.* 177. ch. 11.

Merger.

nant or donee would have been *quasi* tenant for life only; when such his estate would merge in the fee, which would then become executed IN POSSESSION, and, consequently, be subject to POSSESSIO FRATRIS, DOWER, AND CURTESY; as in the following cases:

Subject to *possessio fratris.*

Lands devisable by custom were given to husband and wife in special tail, the remainder to the husband in fee; the husband devised such remainder to the wife, and died without issue: the heir of the husband entered, and was ousted, and then brought assize, and was barred, IN THAT THE FEE WAS VESTED IN THE WIFE, AND HER FRANK-TENEMENT MERGED; for she was tenant in tail *after possibility*, &c. (*i*).

To dower.

So where lands were given to husband and wife in special tail, with remainder to the heirs of the body of the husband;

(*i*) *Brooke*, tit. *Devise*, 42. *Co. Litt.* 28. a. 11 *Co.* 80. b. in Lewis Bowles's case, and the books referred to in (*k*) and (*l*) in the two following pages.

the wife died without issue had between them, and the husband took another wife, and died; and it was held that THE SECOND WIFE SHOULD BE ENDOWED(*k*). [115]

So where lands were given to husband and wife in special tail; remainder to I. in tail; remainder to the right heirs of I. The husband died without issue, his wife surviving, who was now become tenant after possibility, &c. and afterwards she took another husband, and had issue, when I. died without issue, the wife being his right heir, who afterwards died: and it was held that THE SECOND HUSBAND SHOULD BE TENANT BY THE CURTESY: for when the fee descended to the wife, she was tenant after possibility of issue ex- To curtesy.

(*k*) *Vide Hil.* 50. *Ed.* III. *f.* 4. *pl.* 9.

And see also *Fitz. Ab. Dower*, 52. *Bro. Dower*, 25. *Perk. S.* 338. and *Kitch.* 161. b. where the same case is cited. And note, that in the *French edition* of the latter writer of 1592, it is correctly stated. But in many of the *English editions*, (p. 322. of 1675. 317. of 1656, &c.) it is erroneously said that the second wife shall *not* be endowed; which error I find also in some of the French editions.

 tinct,

tinct, and the freehold was merged or absorbed in the fee; and so the wife had the fee IN POSSESSION (*l*).

[116] If the heir enter, and his entry be DEFEATED BY THE ENDOWMENT OF HIS MOTHER, he can have NO ACTUAL SEISIN of the REVERSION OF THE THIRD PART, while such part continues IN DOWER (*m*). Nor can he have any ACTUAL SEISIN of lands of which his father is TENANT BY THE CURTESY (*n*); nor of such as ARE EXPECTANT UPON A LEASE, OR OTHER ESTATE, FOR LIFE (*o*).

Reversion on estate in dower.

In curtesy.

For life.

Thus

(*l*) *Brooke*, *Estates*, 25. *Tenant par le Curtesie*, 4.; and *Kitchen*, 159. b.

(*m*) See *ante*, ch. 1. s. 3. p. 66. *Brooke*, *Descent*, 19. *Kitch.* 109. a. 159. b. *Brooke*, *Ten. par le Curtesie*, 10. *Gilb. Ten.* 27. *Co. Litt.* 241. b.

(*n*) See *ante*, c. 1. s. 3. p. 80. See *Litt.* s. 394. *Co. Litt.* 241. b. *F. N. B.* 194. D. and E. and see 2 *Inst.* 301. and 3 *Co.* 23. b.

(*o*) *Brooke*, *Descent*, 28. *Done*, 55. *Estates*, 67. *Kitchen*, 109. b. *Cro. Car.* 411—12. Reeve & Malster. *Cro. Eliz.* 315—16. 8 *Co.* 96. a. *Co. Litt.* 239. b. 241. b. *Gilb. Ten.* p. 15—19. *Co. Litt.* 11. b. 14. a. note (6). 17. b. and note (4). 3 *Co.*

Thus when there is an anterior eſtate of FREEHOLD, the actual ſeiſin is in the poſſeſſor of *ſuch* eſtate; and, conſequently, the perſon entitled to an intereſt expectant thereon cannot poſsibly be ſaid to be actually ſeiſed thereof on a meſne deſcent (*p*). When ONE ESTATE IN FEE-SIMPLE, therefore, IS LIMITED ON ANOTHER, by way of executory deviſe, it muſt fall under the ſame rule; and THE DESCENT of the CONTINGENT FEE cannot allow of ANY MESNE SEISIN which might turn ſuch deſcent (*q*). [117]

Executory deviſe.

Contingent fee.

" Thus the principles which apply to the deſcent of an eſtate IN POSSESSION, do not apply to the deſcent of an eſtate in

Eſtates in reverſion and poſſeſſion.

3 *Co.* 6. b. See *Ibid.* 42. a. See 1 *And.* 31. *pl.* 74. and 1 *And.* 353. *pl.* 322. *F. N. B.* 197. b. and 9. b. *Robinſ. on Gavelk.* b. 1. c. 6. p. 105. *Moore*, 868. *pl.* 1201. Smales & Dale. *Noy's Max.* 23. c. 4. *Carth.* 128. Kellow & Rowden. *Jenk.* 242. *pl.* 25.; and 1 *Veſ.* 176. Cunningham *v.* Moody.

(*p*) See *ante*, c. 1. ſ. 1. p. 27.

(*q*) See the next ſection, p. 122.

remainder or reverſion expectant on an ESTATE OF FREEHOLD: but they apply when the particular eſtate is only FOR YEARS; a tenant for years being conſidered merely as the bailiff of the freeholder, and to hold the poſſeſsion for him (*r*)."

(*r*) Note (2) to *Co. Litt.* 239. b. (Hargrave and Butler's edit.) See alſo *ante*, ch. 1. ſ. 2. p. 48.; and this ſect. p. 108.

SECT.

SECT. II. [118]

To whom he muſt make himſelf Heir, who claims where there has been no Meſne Seiſin.

IN the laſt ſection we have ſeen that there can be no meſne ſeiſin of any eſtate expectant upon a freehold, when ſuch eſtate continues to deſcend, and the particular acts of ownerſhip have not been exerted; and, therefore, it muſt inevitably follow, that there can be no meſne heir (as ſuch) capable of turning the deſcent. He who claims, muſt, conſequently, make himſelf heir to him in whom ſuch eſtate firſt veſted by purchaſe; or, in caſe ſuch acts of ownerſhip have been exerted, to the perſon who laſt exerted them: thus, as in a caſe before put (*a*), if a gift in tail be made, and the reverſion deſcend to the

No meſne ſeiſin.

Firſt purchaſer.

(*a*) See the laſt ſection, p. 112.

Half-blood. eldeſt ſon (by a firſt ventre) of the donor; which eldeſt ſon, being alſo tenant in tail, die, leaving a ſiſter of the whole, and a brother of the half-blood; the brother of
[119] the half-blood ſhall ſucceed to the reverſion, and not the ſiſter of the whole. The reaſon of this is evident: the reverſion deſcends, on the death of the eldeſt ſon, not to the right heirs of ſuch eldeſt ſon, (for ſuch eldeſt ſon was never actually ſeiſed of the reverſion, but of the eſtate-tail on which it was expectant,) but to the right heirs of the father, or of the perſon who made the gift, or of him to whom limited, given, &c. And therefore, as the younger ſon (by the ſecond ventre) was, on the death of the eldeſt (by the firſt ventre) the right heir of their common father, the donor (for he was of the whole-blood to him, and, being a male, ſhall be preferred to an elder female, and ſo take place of his ſiſter (*b*)—) ſuch younger ſon

(*b*) See *ante*, c. 2. p. 88. canon ii. 2 *Bla. Comm.* 212. ch. 14. and *On Deſcents*, 21. *Hale's Com. Law*, 262. ch. 11. *Robinſon on the Law of Inheritances in Fee-ſimple*, 38. ch. 5. See *Litt.* ſ. 8. and *poſt*, next ſect. p. 124.

ſhall

ſhall ſucceed to the reverſion as well as to the eſtate-tail (*c*).

Heir of the firſt purchaſer.

When, therefore, a reverſion or remainder expectant upon an eſtate of freehold continues in a courſe of deſcent, without such acts of ownerſhip exerted, ſuch reverſion, &c. ſtill continually devolves, on the death of each particular heir, to the perſon who can *then* make himſelf heir to the donor or purchaſer, without any regard to the very heir of the precedent perſon who ſucceeded to it *by deſcent*; till, when the particular eſtate is determined, it ultimately veſts *in poſſeſsion* in him, who, *at ſuch determination*, is the right heir of ſuch donor, purchaſer, or original remainder-man. For as there was no intermediate perſon actually ſeiſed of ſuch reverſion or remainder, no one could, as we have ſaid, be the mean of turning its deſcent, and becoming a new ſtock or *terminus*; but ſuch ſtock muſt yet be the donor, purchaſer, or remainder-man, and muſt ſo *[120]

(*c*) See *ante*, ch. 1, ſ. 4. p. 86. (*l*).

continue

continue (if no alienation be made) till ſuch eſtate ſhall become **VESTED IN POSSESSION**; and, conſequently, it will be abſolutely neceſſary to prove on every devolution a deſcent, not from the immediate predeceſſor who took *by deſcent*, (for with him, as ſuch, we have now nothing to do,) but from the donor, purchaſer, or original remainder-man. Whoever, there-
[121] fore, can make himſelf heir to ſuch donor, &c. will be entitled to the inheritance in reverſion or remainder, though expectant, but yet not ſo as to be capable of tranſmitting it to *his own* right heirs, (as ſuch,) except by granting it over (*d*), till it becomes veſted in poſſeſsion, by the determination of the particular eſtate which ſupported it, or whereon it was expectant, (when it would ceaſe to be a reverſion or remainder,) in him who ſhould be, at that time, the right heir of the donor, &c. which perſon would then become the ſtock of deſcent, and him from

(*d*) See *ante*, laſt ſect. p. 110.

whom the future pedigree must run (*e*), on his obtaining an *actual* seisin of it (*f*).

So also with respect to contingencies and executory devises: thus on a devise to G. in fee; but if he happened to die under the age of twenty-one years, leaving no issue, then to P. in fee: after the decease of the testator, P. died in the life-time of G. who afterwards died under the age of twenty-one, and without issue: it was held, that the lands vested in P.'s heir at law, upon the happening of the contingency, (viz. on the death of G. under age, and without issue,) but that the interest, while it was contingent, did not so attach [122] Contingencies and executory devises.

(*e*) See *Fearne's Conting. Rem.* 449. (3d edit.) *Co. Litt.* 11. b. 14. a. and N. (6). 14. b. 15. a. 3 *Co.* 42. a. *Cro. Car.* 411—12. Reeve & Malster. 8 *Co.* 96. a. 1 *Co.* 95. 99. *Plowd.* 56. 113. 485. 489. *Brooke, Descent*, 2. and 58. *Done*, 5. and 21. *Scire Fac.* 126. *Cro. Eliz.* 334—5. Frederick *v.* Frederick. *Dyer*, 129. *pl.* 63. Bonvil *v.* Payne. See 2 *Com. Dig.* 402. Copyh. (K. 11.) 3 *Ibid.* 51. Descent, (C. 2.) *Robinson on Gavelkind*, *Appendix*, (last page but two.) *Kitch.* 109. b. 1 *Ves.* 174. Cunningham *v.* Moody.

(*f*) See ch. 1. sec. 1. p. 23, and 42.

in

in G. who was heir at law to P. on her decease, as to carry it on his death to *his* heir at law, who was not heir at law to P. but that it vested in that person WHO WAS HEIR AT LAW TO P. (the first purchaser) AT THE TIME OF THE CONTINGENCY HAPPENING (*g*).

(*g*) See 2 *Wilf.* 29. Goodright and Searle; and cited also in *Fearne on Contingent Rem.* 448. (3d edit.) And see *Cro. Car.* 410—13. Reeve & Malster. *Hobart.* 33. Counden & Clerke. *Plowd.* 485. 489. 3 *Com. Dig.* 51. Descent, (C. 2). 2 *Hughes's Abr.* 1484. tit. *Possessio Fratris*; and compare with *Brooke*, *Done*, 8.; and *Co. Litt.* 298. a.

SECT.

SECT. III. [123]

Explanation of the Table of Descents.

FOR the more fully elucidating the doctrines inculcated, and in order to ſhew at one view the different manner in which an eſtate VESTED IN POSSESSION and one IN REMAINDER OR REVERSION EXPECTANT UPON A FREEHOLD would deſcend, I have ſubjoined a table or calendar, which I will now proceed to explain.

Suppoſe then an eſtate given to Henry Warden in tail, with remainder over in fee to Benjamin Brown. Deſcent of a remainder on a freehold.

On the death of Benjamin Brown, the remainder would deſcend, 1ſt, to his eldeſt ſon, (by Anne Lee,) William Brown; and from him, 2dly, to *his* eldeſt ſon, (by Sarah Watts,) Iſaac Brown. Iſaac dying without iſſue,

iſſue, we muſt again ſeek the right heir of his father William, as the repreſentative of his grandfather Benjamin; for Iſaac, having never been actually ſeiſed, could not tranſmit it to *his own* heirs (as ſuch).
[124] Now we find that William Brown left a daughter by his firſt wife, and a ſon by his ſecond; theſe his children are both in the ſame degree; but the younger being a ſon, and ſo more worthy of blood, he (George) ſhall (3dly) ſucceed to the inheritance in excluſion of his elder ſiſter (*a*). George dying without iſſue, we muſt again ſeek the heir of his grandfather, which now undeniably is (4thly) Lucy. Lucy dying likewiſe without iſſue, whereby her father's iſſue are extinct, we muſt ſtill enquire for the heirs of the remainder-man, whom we now find to be (5thly) John Brown (his ſon by his ſecond wife). The remainder then deſcends from John to (6thly) *his* eldeſt ſon Edmund; and from him to (7thly) *his* only ſon James. James dying without iſſue, we muſt once more ſeek the heir of the remainder-man;

(*a*) See the laſt ſect. p. 119. (*b*).

whom

whom we find among the yet living iſſue of John. John leaving a daughter by one wife, and a ſon and daughter by another, the remainder deſcends (8thly) to Henry his ſon by Frances Wilſon, as of the worthieſt ſex: but he dying without [125] iſſue, we again ſeek the heir of Benjamin, and find that John left two daughters alſo by different wives; theſe daughters being in the ſame degree, and both equally the children of their common father, through whom they derive their title to inherit (*b*), ſhall

(*b*) SISTERS OF THE HALF-BLOOD cannot ſucceed *as heirs to each other*; but they *may* ſucceed *as the heirs of their common father*, being equally *his* children.

Si vero habuerit quis plures uxores, & ex qualibet earum filiam vel filias, omnes filiæ erunt pares ad hereditatem patris, eodem modo ac ſi omnes eſſent ex eadem matre. *Glanvill. Lib.* 7. *c.* 3.

Poterit etiam quis haberes plures filias de una matre, et plures de alia, et ſit ſint omnes participes, et capaces hæreditatis paternæ deſcendendis, quantum ad hæreditatem paternam deſcendentem, non erunt tamen participes et capaces quantum ad perquiſitum fratris vel ſororis qui fuerint de eadem matre. *Bract. Tr.* 1. *lib.* 2. *cap.* 30. *ſ.* 3. *fol.* 66. b.

Si titius plures filias reliquerit de una matre vel diverſis genitas, omnes pariter vocandæ ſunt ad ſucceſſionem

ſhall (9thly) ſucceed as parceners. One of theſe daughters dying without iſſue in the life-time of the other, the other ſhall then ſucceed to the whole; for ſhe does not claim as heir to her deceaſed ſiſter, but as the now only heir of her father.

ſionem & ad capacitatem hæreditatis paternæ, & erunt pro uno hærede quamvis animæ diverſæ. *Fleta. lib.* 6. *cap.* 1. *ſ.* 17.

Pluralites de femes, ſicome eſt de ſoers parceners, l. ql. q. eles ſoiet. engedres d. une mere, ou d. pluſurs, q. ſe profert. toutes en leu de un heir, & nule ne eſt plus receyvable d. autr. ne nule ne purra eſtr. autry heir. *Brit. Cap.* 119. *De Succeſs.*

See alſo *M.* 19. *Ed.* II. p. 628. *Mayn.* *Fitzh. Abr. Diſc.* 13. *Quare Imped.* 177. *Bro. Diſc.* 20. 27. *Mordanc.* 43. *Seiſin*, 42. *F. N. B.* 36. E. 197. G. *Dyer*, 291. b. *pl.* 69. 325. *pl.* 38. *Kitch.* 109. b. 110. a. *Hales's Comm. Law*, 264. N. (x). 266. ch. 11. *Robinſ. on Inherit.* 36. c. 5. 2 *Bl. Comm.* 231. ch. 14. *Calth.* 87—8. and the caſe of Jenkins *d.* Harris and wife *v.* Prichard & *al.* *ante*, 113. N. (*g*).

The ſame law as to ſons or daughters in gavelkind. 8 *Mod.* 208. Turner *v.* Turner. *Robinſ. Gavelk.* b. 1. c. 6. p. 100—105. 1 *Freem.* 45. Foxe *v.* Smith.

And ſee alſo *Robinſ.* b. 1. c. 3. p. 37. where a cuſtom is noticed for lands to deſcend to, and be partible among, brothers by the firſt ventre only, to the excluſion of thoſe by a ſecond. See too *Co. Litt.* 140. b.

But

But the furviving fifter dying alfo without iffue, we purfue our old enquiry, and afk again for the heir of Benjamin the remainder-man: and as his male iffue is now extinct, and as he left two daughters, (by different wives,) we find that they or their iffue fhall next inherit (10thly) as heirs to him. On their death, or that of their [126] iffue, whereby the defcendants of the remainder-man are become extinct, we muft yet feek *his* right heir; and this we find to be (11thly) Bridget Brown, his fifter of the whole-blood. For though the half- Half-blood. blood fucceed equally with the whole *among* THE DESCENDANTS *of Benjamin*, according to the worthinefs of fex, or priority of birth; yet, fuch remainder being legally vefted in Benjamin, he alone is the perfon from whom it muft be claimed, and to whom the perfon claiming muft make himfelf heir: for thofe whom we have called the half-blood among his defcendants, are only of the half-blood to each other, but are equally derived from himfelf. But thofe of the half-blood *above him*, being not (by the terms) derived from the fame couple of anceftors as he himfelf

is, cannot poſsibly ſucceed as heirs *to* HIM. And, therefore, though Timothy Brown is the right heir (on the death of Benjamin and his iſſue) to Joſeph Brown, their common father; yet it is not *his* heir that we ſeek, but the heir of Benjamin; and as he is not the heir of Benjamin, (being but of
[127] the half-blood *to him*,) he ſhall not ſucceed to the remainder; but ſuch remainder ſhall deſcend to Bridget, his ſiſter of the whole-blood: but in caſe ſhe die without iſſue, it ſhall then go (12thly) to Thomas Brown, her uncle; and the iſſue of Joſeph, by Emma Atkins, be excluded, as they can never be the right heirs of Benjamin, the firſt purchaſer, from whom it muſt ſtill be claimed. On the death of Thomas without iſſue, the remainder ſhall (13thly) go to *his* uncle, Daniel Brown; and not to his brother, Joſeph Brown; becauſe Thomas having been never ſeized, it would not on his death go to *his* heir, but to the heir of Benjamin; and Joſeph being the *father* of Benjamin could never be (as ſuch) his heir (*c*): And Stephen, not being

(*c*) See *Show.* 246.

derived

derived from the ſame couple of anceſtors as Benjamin, ſhall not ſucceed. From Daniel it ſhall (14thly) go to Abraham, the ſon of Edward and Barbara Brown.

But had it been an eſtate IN POSSESSION, it would have deſcended very differently. It would then have gone from Benjamin to (I.) William; then to (II.) Iſaac; and from Iſaac to (III.) Lucy Brown; who being the perſon now LAST ACTUALLY SEISED, (ſuppoſing the perſons entitled continually to have gained an actual ſeiſin,) IS BECOME THE STOCK OF DESCENT; and therefore we muſt now ſeek for the heir of *her*, and not of Benjamin. Her father, William Brown, left iſſue a ſon, (George,) by his ſecond wife; but this ſon being but of *the* HALF-BLOOD TO LUCY, ſhall never inherit as heir TO HER, though the land ſhould eſcheat to the lord (*d*). We then muſt go one ſtep higher; and here we find (IV.) her aunt Suſannah to be her heir of the whole-blood: Suſannah dying without iſſue, the eſtate again devolves; and as we

Deſcent of an eſtate in poſſeſſion.

[128]

(*d*) *Vide Mich.* 5 *Ed.* II. p. 147—8. *Mayn.*

ſuppoſe her to have been ACTUALLY SEISED, we muſt find out who is now heir to HER: and this we diſcover to be (V.) George Brown, the ſon of her brother William, who, though of the half-blood to Lucy, is of the whole-blood to Suſannah, and, therefore, ſhall inherit TO HER (*e*). And now all the iſſue of his grandfather Benjamin, by his firſt wife Anne Lee, being extinct, we muſt go to (VI.) Bridget, the daughter of Joſeph and Elizabeth Brown; for the iſſue of Benjamin by Jane Smith, being of the HALF-BLOOD *to* GEORGE, ſhall never inherit as heirs TO HIM. But Bridget ſucceeding, and having been ACTUALLY SEISED, we muſt now
[129] have recourſe to HER heir; and this we find to be (VII.) John Brown, the ſon of Benjamin by Jane Smith; for, though of the half-blood to George, he is lineally deſcended from the only brother of the whole-blood to Bridget, and ſhall, therefore, (as the elder iſſue of Benjamin are now extinct,) ſucceed TO HER (*f*). From John it deſcends to (VIII.) Edmund; and

(*e*) See *Litt.* ſec. 8.

(*f*) *Ibid.*

from

from Edmund to (IX.) James; and from James to (X.) his aunt Penelope; and from Penelope to (XI.) *her* aunt Catherine: for though the iſſue of her father, John Brown, by Frances Wilſon, are but of *the* HALF-BLOOD *to* PENELOPE, yet they are the now-only repreſentatives *of* JOHN, who was the brother of *the* WHOLE-BLOOD *to* CATHERINE; and, therefore, the eſtate ſhall deſcend FROM HER to (XII.) Henry Brown; and from HIM to (XIII.) Felicia; and ſhe being the laſt of the iſſue of her grandfather Benjamin, we find Thomas, the ſon of Philip and Eſther, to be (XIV.) HER heir: for as to Bridget, the daughter of Joſeph and Elizabeth, it has already paſſed her; and Timothy, the ſon of Joſeph and Emma, is but of the HALF-BLOOD *to* FELICIA, and therefore ſhall NOT ſucceed TO HER; but he *ſhall* ſucceed [130] as heir TO THOMAS, being the now-only ſon of *his* brother Joſeph (his brother of the whole-blood). From Timothy (XV.) it goes to (XVI.) Daniel; and from Daniel to (XVII.) Stephen; and from Stephen to (XVIII.) Abraham Brown and his iſſue, &c.

As it was the principal intention of the Author, when he compiled this work, to connect what other writers had incidentally treated of, or to explain what they had left in obscurity, he contented himself with tracing, in the annexed table, the descent of a reversion or remainder on a freehold, and that of an estate in possession, in the *paternal* line only of the purchaser. The succession as to the *maternal* line he conceived as sufficiently marked out in the learned pages of our elegant commentator; and, therefore, thought it unnecessary to detail what he has advanced. But, as it has been suggested that it would render his scheme more complete by tracing such descent through the maternal line also, he has been induced to add the following remarks.

On the extinction of the issue, and also of the *paternal heirs*, of Benjamin Brown, the remainder or estate in possession, for the descent of *either* must, in this respect, be perfectly the same, would go to the right heirs of (XIX. & 15.) Barbara Finch; on their failure, to those of (XX. & 16.)

Margaret Pain; and, on default of *her* heirs, to thoſe of (XXI. & 17.) Eſther Pitt; and, for want of ſuch, to thoſe of (XXII. & 18.) Elizabeth Webb, the mother of Benjamin. The rule always being to give the preference to the paternal line, and not to have recourſe to the maternal till the paternal be exhauſted.

In tracing the paternal line we begin with the father of the perſon laſt ſeiſed, or firſt purchaſer, and proceed *upwards* through the grandfather, great-grandfather, &c. as far as the line can be purſued. When the heirs on this part can be no longer diſcovered, we begin with thoſe of *the wife of that paternal anceſtor with whom our diſcoveries ended*, and continue, in a contrary direction, proceeding *downwards* to the heirs of the mother: Thus it firſt goes to (11.) Bridget; then to (12.) Thomas; then to (13.) Daniel; then to (14.) Abraham, &c.; but if we ſeek the heir of Benjamin in the maternal line, we begin with (15.) Barbara; then proceed to (16.) Margaret; then to (17.) Eſther; and then to (18.) Elizabeth.

As a purchaſer takes his feud *ut antiquum*, it is preſumed to have *deſcended paternally*(*g*); and, therefore, it has been determined that the brother of the grandmother ſhall ſucceed before that of the mother(*h*). So, if no heir can be found to his great-grandfather, and the eſtate in queſtion cannot be *proved* to have ſtrictly deſcended from the great-grandmother, the law will not preſume that it deſcended from her, but that it came from the great-grandfather's *father*; but if his iſſue be extinct, it will ſtill ſeek for the paternal heir, and ſuppoſe that it came from the father of the latter; but when it can trace ſuch paternal heir no further, it muſt, neceſſarily, have recourſe to the female line: And as it is with Edward Brown (ſee the table) that its preſumption ceaſes, it muſt there begin with the maternal heirs. It uniformly preferred the male line to the female; the father to the mother; the grandfather to the grand-

(*g*) See *poſt*, ch. 5.

(*h*) *Plowd.* 444. *Dyer*, 314. a. *pl.* 95. Clere *v.* Brook.

mother,

mother, &c.; ſo here in Barbara Finch ſuch preference ends. It preſumed it to have deſcended to Edward, *paternally*; but it can trace his paternal line *no further*; it, therefore, conſiders it as coming from Barbara. In other terms, as the eſtate cannot be *proved* to have come to Benjamin Brown from *his* mother Elizabeth, it is preſumed to have deſcended from his *father*, Joſeph. To Joſeph, indeed, it might have come from his mother, Eſther; but as it cannot be *ſhewn* to have done ſo, it is *ſuppoſed* to have come from Philip. To him it might poſsibly have deſcended from Margaret; but this not appearing, it is ſuppoſed to have been derived from Robert. To Robert it might have deſcended from *his* mother, Barbara; yet the preſumption is in favour of his *father*, Edward Brown. But as the pedigree or line of the Browns can be no further traced, it is preſumed to have come from Barbara Finch; and, conſequently, as there is no one to carry the preſumption from her, HER heir ſhall be conſidered as having title to the premiſes. If no heir of Barbara can be found, the preſumption is in favour of, and remains

with,

with, Margaret Pain: if *her* heir cannot be diſcovered, it is then in favour of Eſther Pitt; (for Dinah Ward was not an anceſtor of Benjamin Brown the remainder-man, or perſon laſt ſeiſed; and, therefore, it could *not* have deſcended to him from *her*). If no heir can be found to Eſther, it ſhall go to that of Elizabeth Webb; as no other perſon can ſhew the probability to preponderate in his behalf; (Emma Atkins being in the ſame predicament with Dinah Ward).

The queſtion, however, whether the line of the father's mother, or that of the father's paternal grandmother, ſhould firſt ſucceed to the inheritance of the ſon? has been a matter of much controverſy; and, therefore, calls for a more particular inveſtigation.

We are informed by *Plowden* (*i*), in his report of the caſe of Clere *v.* Brook, that Mr. Juſtice *Manwoode* affirmed that the *former* line ſhould be preferred; and in a

(*i*) *Comm.* 450.

no te

note which is ſubjoined to his report of that caſe, he alſo tells us that he afterwards put the queſtion to Mr. Juſtice *Manwoode* in the preſence of Mr. Juſtice *Harper*; and again, ſeverally, to Mr. Juſtice *Mounſon* and *Sir James Dyer*; and that they were all of opinion, that the brother of the father's mother ſhould firſt take: though the reporter has, at the ſame time, taken care to add that many were of a *contrary* opinion; namely, that the brother of the father's paternal grandmother ought to have been preferred.

The doctrine, however, of Mr. Juſtice *Manwoode* has been adopted by Lord *Bacon* (*k*), by Sir *Matthew Hale* (*l*), and by the *Lord Chief Baron Gilbert* (*m*); while the contrary poſition has been maintained by Mr. *Robinſon* (*n*), and Mr. Juſtice *Blackſtone* (*o*).

(*k*) *Elements*, I. p. 3. *Tracts*, 37. *edit.* 1737.
(*l*) *Hiſt. Comm. Law*, 268, &c. *edit.* 1779.
(*m*) *Ten.* 19.
(*n*) *Law of Inherit. in Fee-ſimple*, ch. 6. &c.
(*o*) 2 *Comm.* 238. ch. 14.

The

The arguments of the latter writer were, however, controverted by an anonymous author, in a pamphlet, which appeared in the year 1779, entitled, "Remarks on the Laws of Defcent; and on the Reafons afsigned by Mr. Juftice *Blackftone* for rejecting, in his Table of Defcent, a point of doctrine laid down in *Plowden*, Lord *Bacon*, and *Hale* (*p*)." In a note to a late edition of the Commentaries, Mr. Juftice *Blackftone* was vindicated by Mr. Profeffor *Chriftian*; and Mr. Profeffor *Chriftian* has, in his turn, been charged with inconfiftency in his defence; and the tenets, both of the author of the Commentaries and his annotator, have been again denied by the fame anonymous writer, in another pamphlet, which has recently made its appearance under the title of "Remarks on the Inconfiftency of the Table of Defcents, projected by Mr. Profeffor *Chriftian*, in the twelfth edition of the Commentaries, with the doctrine laid down by Sir *William Blackftone*, and by every writer on the Law of Defcents."

(*p*) This will be referred to as the "*Firft Pamphlet.*"

Now

Now it is, indifputably, laid down as law, *That, in the cafe of a purchafe*, (and, in our inftance, Benjamin Brown took the remainder by purchafe,) *the paternal line fhall always be preferred to the maternal; and that the heirs on the part of the mother fhall never fucceed till thofe on the part of the father be exhaufted* (*q*):

That the father has TWO *immediate bloods in him; viz. the blood of his father, and the blood of his mother* (*r*): And

That a perfon taking lands by purchafe in fee-fimple, fhall take them as a feud of indefinite antiquity (*f*).

Thefe principles prefent a folution of this queftion on which there has been fuch a contrariety of opinion; and, if the confequences of thefe principles be impartially and deliberately purfued, we fhall, I think, be foon led to certainty on

(*q*) *Litt.* f. 4. and *Co. Litt.* 12. a. and b.

(*r*) *Co. Litt.* 12. a. *vide Remarks*, (Firft Pamphlet,) 8.

(*f*) *Wright's Ten.* 17. 180. 2 *Bl. Comm.* 220, &c.

a point

a point as to which, one would have supposed, even ingenuity itself could not have suggested a doubt.

If a purchaser, therefore, die without issue, we are to seek for his heir among the issue of his father: if none of those remain, we ask for those of his grandfather: if none of those are to be found, we pursue our enquiries among the issue of the great-grandfather; and so on *ad infinitum*; or, according to the annexed table, the issue of Joseph and Elizabeth Brown shall first take; then the issue of Philip and Esther; then those of Robert and Margaret; and, lastly, the issue of Edward and Barbara Brown (*t*). And we will suppose

(*t*) For the more easily consulting the Table of Mr. Justice *Blackstone*, the following list of corresponding names is subjoined:

Benjamin Brown, - -	John Stiles,
Joseph and Elizabeth Brown, -	Geofferey and Lucy Stiles,
Philip and Esther Brown, -	George and Cecilia Stiles,
Robert and Margaret Brown, -	Walter and Christian Stiles, (Their issue, Class No 8.)
Edward and Barbara Brown, - -	Richard and Ann Stiles, (Their issue, Class No. 9.)
David and Grace Pain, - -	William and Jane Smith, (Their issue, Class No. 10.)
Walter and Sarah Pitt, - -	Luke and Frances Kempe, (Their issue, Class No. 11.)

pose

pofe, that we can trace the male paternal line of Benjamin Brown, the purchafer, no further than to Edward, his paternal grandfather's paternal grandfather.

The queftion, therefore, will now be, Who is the next heir of Benjamin Brown? —The brother of Barbara Finch, (the paternal grandfather's paternal grandmother); the iffue of David and Grace Pain, (the brother of the paternal great-grandmother, or Mr. Juftice *Blackftone*'s Clafs No. 10.); or the iffue of Walter and Sarah Pitt, (the brother of the paternal grandmother, or Mr. Juftice *Blackftone*'s Clafs No. 11.)?

But, in order to come immediately to the queftion, we will fuppofe our enquiries, as to the male paternal line, to end in Philip Brown, the paternal grandfather; rather than in Robert Brown, the paternal grandfather's father, or in Edward, the paternal grandfather's paternal grandfather.

Now,

Now, we find, according to the position we have noticed, that Philip Brown was composed of the bloods both of his father and mother; that of his father we suppose exhausted; but that of his mother remains in the issue of David and Grace Pain, (or in the Class, No. 10). It appears, therefore, most evidently, from the authorities cited, that the blood of Robert is *not* exhausted; and, consequently, we must seek for his heir in his unexhausted blood, or in the issue of David and Grace Pain, (or in the Class, No. 10). Lord *Coke* says, expressly, that "the father has *two* immediate bloods in him—the blood of his father and the blood of his mother. BOTH *these bloods are* OF THE PART OF THE FATHER: *and* BOTH *these bloods of the part of his father* MUST BE SPENT, *before the heir of the blood of the part of the mother shall inherit* (u)." And it is acknowledged by Lord *Hale* (x), that the collaterals of the father's mother, of the father's grandmother,

(u) *Co. Litt.* 12. a. and b.

(x) *Com. Law.* 271.

mother, and of the father's great-grand-mother, *are of* THE BLOOD OF THE FATHER.

If, then, the paternal great-grand-mother be of the blood of the father, ſhe muſt, of conſequence, be of the blood of the paternal grandfather, or of Philip Brown; and conſequently, alſo, as the *paternal* line of Philip is ſuppoſed extinct, it ſhould ſeem that the next heir muſt be found in his *maternal* blood, or in that of Margaret Pain, or in the Claſs, No. 10.

Again: As the feud is held *ut antiquum*, it is ſuppoſed to have *deſcended* to the purchaſer from his anceſtors; and, as the paternal blood is always preferred, to have deſcended to him *paternally*. Now, if it had *actually* deſcended in the paternal line, (and an *actual* deſcent is, by the very terms, *preſumed* (*y*)—), it may be conſidered as having been once actually veſted in the purchaſer's paternal anceſtors; and, conſequently, it may be ſuppoſed to have

(*y*) And ſee *Wright*, 180. 2 *Bl. Comm.* 212.

actually deſcended from the moſt remote. Now, if we ſuppoſe it to have actually deſcended from Philip Brown; that we can trace the paternal line no higher than Philip; that the blood of Philip was compoſed of the bloods both of his father and mother; and that his father's blood is exhauſted; the brother of his mother, (or the Claſs, No. 10), muſt certainly be the heir to the premiſes: and the brother of Eſther Pitt, (or the Claſs, No. 11), cannot poſsibly be entitled, while any of the former Claſs, (No. 10), be in exiſtence.

If the *preſumed* deſcent is *not* to be conſidered as an *actual* one, when compatible with the end of the preſumption, there is no meaning in terms. As the law, therefore, preſumes, that the feud deſcended *paternally*, ſuch feud muſt be conſidered as having actually done ſo, while the conſideration will anſwer the end for which ſuch preſumption was adopted. If it will not anſwer that end, the preſumption, as to its paternal deſcent, ceaſes; and the law will deem the feud to have deſcended *maternally*, rather than it ſhould eſcheat

to

to the lord of the fee (z). Hence it admits the heirs of the *mother* of the purchaser, when those of the father are no longer to be found.

As the heirs on the part of the father are to be preferred, or, in other terms, as the feud is presumed to have descended to the purchaser from his father, the law enquires (in case of the death of the purchaser without issue) for the heir of the father; as he who ought to inherit to the father, ought, pursuant to an ancient axiom (a), to inherit also to the son; for, in the consideration of the present question, we have nothing to do with the half-blood.

Now, if the feud be presumed to have descended to the purchaser from his father, and his father has left no issue, the next enquiry is, How did the father inherit it? If he inherited it from *his mother*; it must

(z) *Pasch.* 49 *Ed.* III. *pl.* 5. *fol.* 11. b. 12. a.

(a) *Mich.* 12 *Ed.* IV. *pl.* 12. *fol.* 14. a. and see 2 *Bl. Comm.* 220. and 239—240.

be *ſo proved*; and if it be *not ſo proved*, it will be preſumed to have deſcended to him *from his father*; as the preſumption is in favour of the male line.

On the preſumption that it deſcended from the grandfather, and that the grandfather has left no iſſue, the queſtion will then be, From whom did *he* inherit it? Here the preſumption again returns, That *he* inherited it from HIS FATHER, or Robert Brown. But, according to our ſuppoſition, the male *paternal* line, or that of *Brown*, can be no further traced than to Philip; the law *then* will preſume that the feud deſcended to Philip *maternally*, and, conſequently, from Margaret Pain; and, conſequently, the next heir to the premiſes muſt be *her* brother, or the Claſs, No. 10.

Again: As the antiquity of the feud is merely *preſumed*, no particular anceſtor can be abſolutely precluded from being the ſtock of the deſcent. The firſt preſumption, indeed, is that the feud had deſcended from the male anceſtor; but it might,

might, by poſsibility, have deſcended from a female: it might have deſcended from the mother, or grandmother; the great-grandmother, or great-great-grandmother: All theſe lines, therefore, ſhall, in their turn, ſucceed to the inheritance of the ſon, on the extinction of the line which the law firſt enables to ſucceed.

Now the ſon might, by poſsibility, have inherited the feud from his mother, his grandmother, great-grandmother, &c. as well as from his father, his grandfather, his great-grandfather, &c. but the preſumption will be that it had deſcended in the *paternal* line. We can, however, trace that line no further than the paternal grandfather, Philip Brown; but *ſo far* we *can* trace it; and *ſo far* the preſumption will carry us. If then we ſuppoſe that the ſon took the feud by deſcent from Margaret Pain, his paternal grandfather's mother, this preſumption that he took it by deſcent from his father Joſeph Brown, and that Joſeph Brown took it by deſcent from *his* father Philip Brown, will be preſerved; ſince both Joſeph and Philip might have

taken it by defcent from *her:* and, confequently, *her* brother, or the Clafs, No. 10. muft be entitled. Whereas fhould we deem the feud to have defcended from Efther Pitt, the purchafer's grandmother, and fo firft admit the Clafs, No. 11.; fhould we not immediately contradict our firft prefumption, that it had defcended from the *paternal* line; *i. e.* from Philip Brown, to whom we *could* have traced it, prefumptively? If, inftead of confidering it as defcended from the purchafer's paternal grandmother, we regard it as coming from his mother, Elizabeth Webb, furely we muft contradict our prefumption ftill more grofsly, fince we muft then exclude not only Philip Brown, but Jofeph alfo. But, as it is agreed on all fides, that the brother of Efther Pitt, or of the paternal grandmother, fhall take before the brother of Elizabeth Webb, or of the mother (*b*), muft not the brother of Margaret Pain, or of the paternal great-grandmother, be preferred to Efther Pitt? Will not every reafon that can carry us to the line of the

(*b*) Clere & Brook. *Plowd.* 444. *Dyer*, 314. a. S. C.

grandmother in preference to that of the mother, carry us alſo to that of the great-grandmother in preference to that of the grandmother? And, as the purchaſer, his father, and his paternal grandfather, might have taken the feud from the paternal great-grandmother, Margaret Pain, while the purchaſer, and his father only, could have taken it from the paternal grandmother, Eſther Pitt, muſt not the chance or probability, and, conſequently, the preſumption, be in favour of the former, or of the Claſs, No. 10? And, if we could have traced the male paternal line higher than Philip Brown, the chance or probability, and, conſequently, the preſumption, would, from the very nature of the thing, be proportionably encreaſed, according to the remoteneſs of the female paternal anceſtor.

Again: A wife (as a wife) is not an anceſtor. Now, if we can trace the feud preſumptively to the purchaſer's paternal grandfather, Philip Brown, and ſuppoſe *his* paternal line exhauſted, then Philip Brown muſt be ſuppoſed to have had the

feud from *his mother*, Margaret Pain, and not from his *wife*, Efther Pitt; fince the prefumption will be that *he alfo* had taken it by defcent; and, confequently, the brother of his mother, or the Clafs, No. 10, muft be entitled to the inheritance.

As, therefore, the law gives the preference to the heirs of the male rather than to thofe of the female, and to the heirs of the mother rather than to thofe of the wife; if the feud can be traced prefumptively to the paternal grandfather, muft not *his* mother's heirs be firft entitled, if thofe of his father are no longer to be found? If we prefer the blood of the grandmother to that of the great-grandmother, do not we contradict the very axioms we fet out with? Do not we give the preference to the grandmother rather than to the grandfather? To the wife than to the hufband? To the female than to the male? Can we be faid to prefer the grandfather, when we fhut out *his* maternal heirs from the fucceffion? If a perfon's blood be compofed of that of *both* of his anceftors, muft not his blood be confidered

dered as exifting till that of *both* of his anceftors be no more? If the blood of *the mother* (the mother of an anceftor, however remote,) continue, muft it not be a continuance of the blood of the fon? Can *his* blood be confidered as exhaufted, while one-half of it remains? Can we deem it wholly extinct when one-half is not taken into confideration (*c*)?

From what has been advanced, therefore, it fhould feem to follow inevitably. that the brother of the paternal great-grandmother ought to be preferred, in the fuccefsion, to the brother of the paternal grandmother. But, before the fubject be difmiffed, it may be proper to confider more particularly what has been urged in favour of the contrary pofition.

And, in the firft place, it is obfervable that it is not noticed by *Plowden* that Mr. Juftice *Manwoode* cited any authority in fupport of what he advanced: nor is either of the other Juftices noticed as having

(*c*) *Watk.* N. XVII. to *Gilb. Ten.* 19. e. p. 336, &c.

cited

cited any: nor does the reporter himſelf, either in the caſe or the ſubjoined note, refer to any authority: neither does *Lord Bacon:* neither does *Sir Matthew Hale*: neither does the *Chief Baron Gilbert* cite any.

The author of the *Remarks*, indeed, ſays(*c*) that the *Yearbook*, *Mich.* 12. *Ed.* IV. 12.(*d*) might be juſtly cited in ſupport of his own ſyſtem: "For the queſtion," ſays he, "between *Manwoode* and Mr. Juſtice *Blackſtone* is this, When all the repreſentatives of the male ſtock of the paternal line are extinct, who ſhall ſucceed? The former ſays the heir of the *Ailes*; the latter the heir of the *Beſailes*; but, what is moſt ſingular, to ſupport his (Mr. Juſtice *Blackſtone's*) argument, an authority is brought which, upon the ſame queſtion, gives the ſucceſsion to the *Ailes*: "The heir of the ſon, on the part of the *Ailes*, ought to inherit."

(*c*) *Firſt Pamphlet*, 39.

(*d*) *Fol.* 14. a.

Now

Now it ſhould be obſerved, that there is not one word in this caſe in the *Year-book*(*f*) which ſays that the heir of the *Ailes* ſhould exclude the heir of the *Beſailes*; but only that the heir of the *Ailes* ſhould take, and not the heir of the mother; which is not diſputed. Could the iſſue have been ſuppoſed to have left an heir on the part of the *Beſailes*, no intimation is given in the caſe that ſuch heir ſhould not have ſucceeded in preference to the heir on the part of the *Ailes*. This caſe, therefore, does not appear to be a caſe which might be juſtly cited in ſup-

(*f*) *Nota q. fuit ten. p. touts les Juſtic. de Comen Bank, q. lou home p.chaſ. terre* & *devy ſans iſſue* & *ſans heir de pt. le pere, q. ſon prochein heir de pt. le mere ava. le terr.* & *ſi hoe. p.chaſe. tr.* & *ad iſſue* & *devy, l'iſſue ent.* & *devy ſans iſſue,* & *ſans heir de pt. s. pier. s. de pt. aile s. pere, q. en ceſt caſe l'heir de pt. le mer. s. pere. s. de pt. ſon aielles doit enherit, car ceſty q. doit enherit. al pere doit enheriter al fits.—Fuit [auxy.] ten. ſi home purch. terr.* & *ad iſſue, q. ad le terr. per diſc.* & *puis l'iſſue devy ſans iſſue* & *ſans heir de part le pere, q. l'heir de pt. le mere le fits ne doit enheriter, car il n'eſt de ſank ceſtuy en q. l'original poſſeſſ. commence. s. il n'eſt de ſank le pere,* &*c. mes l'heir le fits de part l'aielles, s. de part le mere ſon pere doit enherit,* &*c.*

port of the poſition that the brother of the paternal *Ailes* ought to be preferred to the brother of the paternal *Beſailes*.

Seeing then that there is no authority referred to which can eſtabliſh the contrary poſition, it remains only to examine into the reaſons alleged in its ſupport.

Mr. Juſtice *Manwoode* ſays (*g*) that the brother or ſiſter of the purchaſer's paternal grandmother ſhall be preferred before the brother or ſiſter of the purchaſer's paternal great-grandmother, BECAUSE *they are equally worthy in blood* (for ſuch heirs come from the blood of the female ſex, from which the purchaſer's father iſſued); *and, where they are all equally worthy, the next of blood ſhall always be preferred as heir.*

And *Plowden*, in his note, when ſpeaking of his putting the queſtion to *Manwoode*, in the preſence of *Harper*, J. aſſerts the reaſon to be—" Becauſe the former (*i. e.* the brother of the paternal grand-

(*g*) *Plowd.* 450.

mother)

mother) is *nearer in blood* to the purchaſer on the part of his father; which proximity holds place on the part of females conjoined by marriage to males, where ſuch blood is once derived by a male to the firſt purchaſer."

Lord *Bacon* (*h*) ſays, If a man purchaſe land in fee-ſimple, and die without iſſue, in the firſt degree the law reſpecteth dignity of ſex and not proximity; and, therefore, the remote heir, on the part of the father, ſhall have it before the near heir on the part of the mother; but, in any degree paramount the firſt, the law reſpecteth not [What? (*i*)] and, therefore, the near heir by the grandmother, on the part of the father, ſhall have it before the

(*h*) *Elements*, I. p. 3. *Tracts*, 37. edit. 1737.

(*i*) If dignity of ſex, the poſition is indiſputably erroneous; and if dignity of blood, then there muſt be dignity of blood to reſpect; and, conſequently, there muſt be an inequality of dignity; and, if there be an inequality of dignity, the rule of proximity cannot apply; as it can only apply where the dignity is *equal*.

remote

remote heir of the grandfather, on the part of the father.

Lord *Hale*, though he acknowledges that the brother of the father's grandmother and the brother of the father's great-grandmother, are of the blood of the father; and that the great-grandmother's blood has paſſed through more males of the father's blood than the grandmother's, yet ſays (*k*) The father's mother's ſiſter ſhall be preferred before the father's grandmother's, or the purchaſer's great-grandmother's, brother, BECAUSE they are all *Cognati*, and not *Agnati*; and the father's mother's ſiſter is the *neareſt*; and, *therefore*, ſhall have the preference.

Chief Baron Gilbert, after noticing the preference given to the paternal line, ſays (*l*), "If the father's male line failed, it (the feud) went to the female blood of the father; for the Lords were preſumed rather to reſpect the female blood of their

(*k*) *Com. Law*, 271—2.

(*l*) *Ten.* 19.

former

former tenants than the blood of the mother, who was newly introduced into the family of ſuch their feudary: Becauſe the feud was given *as an ancient one:* and, by conſequence, the blood of the precedent tenant was preferred to any other. But the blood of the father's mother was preferred to the blood of his grandmother, being both female bloods; and both coming under the conſideration of ancient tenants, the nearer tenant's blood was preferred to the more remote."

In ſhort, the rule aſſumed appears to be this, "Where the dignity is equal, there the proximity ſhall prevail." And, conſequently, the firſt thing to be enquired into is, Whether, in the preſent caſe, the dignity of the blood of the paternal grandmother and that of the paternal great-grandmother *be* abſolutely equal?

The brother of the paternal grandmother and the brother of the paternal great-grandmother claim, it is true, as the heir of a female; and, *ſo far*, they may be conſidered as equal in dignity; but the former,

former, in making out his title to the firſt purchaſer, can only claim through Joſeph Brown, the father; whereas the latter can claim through Philip Brown alſo: he, therefore, derives his title through more males of the paternal line (*m*); and, conſequently, ſhould ſeem the more worthy.

And, as the equality of dignity may be thus queſtioned, ſo the proximity itſelf may be doubted as applicable to the preſent caſe. For, though the ſon be the firſt purchaſer, yet he takes his feud *ut antiquum*; and, conſequently, as ſuch feud is ſuppoſed of indefinite antiquity, and as we can trace it, in preſumption, up to his paternal grandfather, we muſt prove that his paternal grandfather's blood be exhauſted, before we can have recourſe to any other blood; and, conſequently, according to principles already noticed, and acknowledged by Lord *Hale*, Lord *Coke*, &c. as the paternal grandfather was compoſed of *two* bloods—thoſe of his father

(*m*) See *Plowd.* 451 *Note. Hales' Com. Law.* 271 —2. and 2 *Bl. Comm.* 238—9.

and

and his mother; and, as his *father*'s is extinct, his heir (and, by consequence, the heir of the grandson) must remain in the blood of *his* (the grandfather's) *mother*; as one of his bloods *is* exhausted, and the other *not* exhausted: and if the other be *not* exhausted, his blood cannot be extinct; and if his blood be *not* extinct, in that other blood must his heir be found; and, consequently, the brother of the paternal grandfather's mother must be *nearer* to the paternal grandfather, at least, than the brother of a woman whose blood (as such) could possibly form no part of his. And it can be no answer to this mode of argument to say that the grandson was *seized*(*n*), since, though it is admitted that the grandson took as first purchaser, yet he took the feud as a feud OF INDEFINITE ANTIQUITY; and, consequently, as a feud which is *presumed* to have descended from the father and grandfather, and, consequently, which must be considered as having actually descended from them, while any of their

(*n*) See *Hale's Com. Law*, 269.

blood (and their *mothers*, refpectively, *were* of their blood (*o*)—), be remaining; for otherwife there is no meaning in the terms.

And as to the reafoning of the *Lord Chief Baron Gilbert*, it does not appear fatisfactory: For if the lords were prefumed to refpect the female blood of their former tenants rather than the blood of the mother who was newly introduced into the family of their feudary, and the blood of the precedent tenant was preferred to any other, it fhould feem to follow that the more remote tenant's blood fhould have been preferred to the nearer, rather than that the nearer fhould have been preferred to the more remote.

And as to *Lord Bacon's* doctrine it feems equally unfatisfactory, and, by far, more unintelligible. And when it is confidered that the author of *the Remarks* (*p*) obferves, that one at leaft of the pofitions of his

(*o*) See *Hale*, 271—2. *Co. Litt.* 12. a. and b. &c.

(*p*) *Firft Pamphlet*, 31. 33.

Lordſhip "is totally repugnant to the ſpirit of thoſe laws whence the doctrine of deſcent originates," and that "it has been contradicted by every writer on the ſubject, and is, therefore, inadmiſsible," any further obſervation on the paſſage cited would ſurely be deemed unneceſſary.

But, even granting that the blood of the paternal grandmother and the blood of the paternal great-grandmother are equal in dignity, and that the proximity is in favour of the former, yet the application of the rule—"That where the dignity is equal the proximity ſhall prevail"—may be, at leaſt, queſtionable in the preſent inſtance.

Now it is acknowledged by the author of the *Remarks*(q), that proximity can only prevail where the dignity *is* equal: and he cites from Mr. Juſtice *Blackſtone*(r), that "the object of the common-law is proximity merely: *not indeed* AN ABSO-

(q) *Firſt Pamphlet*, 30.

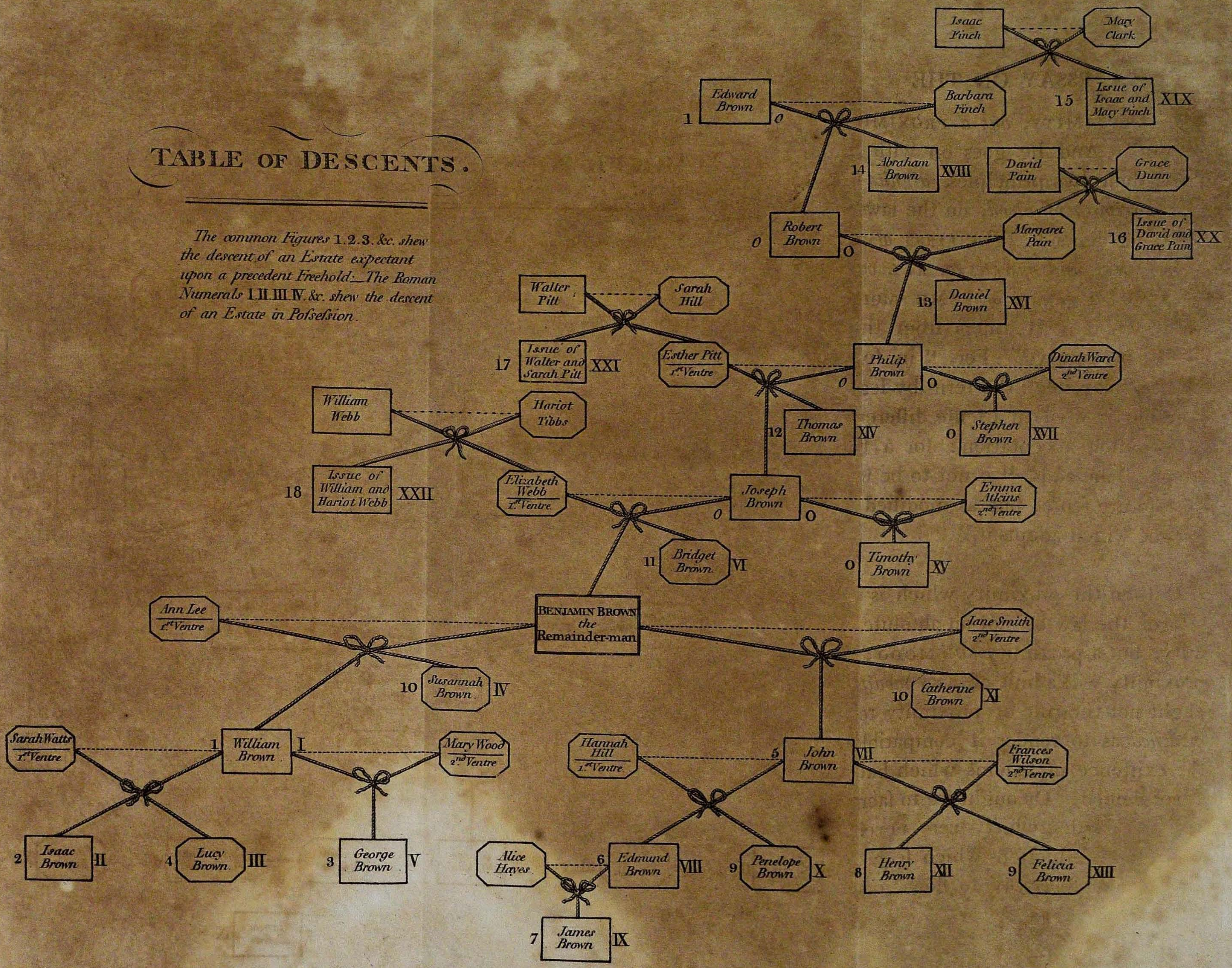
(r) *Firſt Pamphlet*, 11—12.

LUTE PROXIMITY, *but a* PROXIMITY SUB MODO." And he goes on with ſaying, " On theſe two principles, *dignity of blood* and *proximity of blood*, do the laws of inheritance depend. *The* FIRST *of them* IS ABSOLUTE, *and operates on* ALL *occaſions*; *the* SECOND *admits of* SOME MODIFICATION, whereby it differs from the ſtrict idea of proximity." For, " in ſome inſtances," ſay he, " the term by legal conſtruction is uſed in a ſenſe different from its common acceptation: for a term of ſcience," he adds, " is not to be taken in its abſolute ſenſe, but as modified by the ſcience which adopts it."

If then the proximity which is the object of the law be not an abſolute proximity, but a proximity SUB MODO; if that proximity will admit of ANY *modification*; ought not the rule of proximity to be so *modified* as to render it compatible with the exiſtence of axioms which have been never denied? Or ought we to ſacrifice to this rule, rules which were never queſtioned, or deductions which ſeem inevitably and indiſputably to flow from thoſe rules?

TABLE OF DESCENTS.

The common Figures 1. 2. 3. &c. shew the descent of an Estate expectant upon a precedent Freehold:—The Roman Numerals I. II. III. IV. &c. shew the descent of an Estate in Possession.



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rules? If the brother of the paternal grandmother is to be preferred to the brother of the paternal great-grandmother, merely in compliance with this rule of proximity, what is to become of the rules—That the preference is due to the paternal line—That a *feudum novum* is to be held *ut antiquum*—That a perſon's blood is compoſed of that of *both* of his anceſtors? And what is to become of that principle of common-ſenſe which teaches us that *The* WHOLE CANNOT BE EXHAUSTED WHILE ONE-HALF OF IT REMAINS?

[131]

CHAP. IV.

OF THE ENTRY OF A POSTHUMOUS HEIR.

Abeyance.

Tenant of the freehold.

Infant *in ventre sa mere.*

Entry of the then-born heir.

Entry on him by the infant.

BY the feudal law the freehold could not be vacant, or, as it was termed, *in abeyance:* there must have been a tenant who was capable of fulfilling the feudal duties, and against whom the right of others might be maintained. An infant *in ventre sa mere* was not, on these occasions, considered as *in esse*, and, consequently, could not be considered as a tenant. On the devolution, therefore, of an estate, the *then-born* person who was, at such devolution, entitled, (as, for instance, the brother of the deceased,) was permitted to succeed: and though the issue, while *in ventre sa mere*, was not regarded as *in esse*, yet (when afterwards born) as it was the person whom the law would have pointed out to enjoy the inheritance

heritance of his father, had it been *in esse* when he died; and as the reason for the entry of the uncle had now ceased, since the issue became capable of holding the hereditaments descended, and of fulfilling those duties by his guardian, such issue was permitted to enter upon the uncle, and to enjoy the estate. [132] Guardian.

But though the law respecting the subject of this chapter, since the time of the statute 10 & 11 WILL. 3. c. 16. does not appear sufficiently clear and determined, yet it certainly is confined within very narrow limits, when compared with the law as it stood *before* the passing of that act. Several nice distinctions then existed, which are now, as to this point, apparently done away. However, they seemed to have been founded upon principles which cannot be shaken, without shaking the whole law. Those principles exist, though their application to these cases, and their consequences with respect to them, may, perhaps, be now no more. Those principles, and the deductions which may yet be drawn from them, still deserve our atten- Stat. of Will. 3.

tion, and may be confidered as extending to certain points and purpofes to which that ftatute does not reach. And as the particular points to which that ftatute *does*
[153] extend are by no means, I think, fatisfactorily determined, it may not be improper to confider the ancient as well as the modern law as to this head.

When the after-born nearer heir might have entered.

When, therefore, a perfon fucceeded to an eftate by DESCENT, or PER FORMAM DONI, fuch eftate *fhould* have been devefted by the fubfequent birth and entry of a nearer heir; but if the perfon who fo fucceeded had claimed *by* PURCHASE (*a*), an after-born nearer heir could *not* have devefted it. So in the cafe of a remainder or reverfion expectant upon an eftate-tail, the after-born iffue might have entered and devefted THE POSSESSION of the reverfioner or remainder-man, but could not have affected THE VESTING IN INTEREST

(*a*) Or entered on condition broken, or on fulfilling fuch condition. *Sed Quære.* and *vide Pafch.* 9 Hen. 7. *pl.* 11. *fol.* 25. a. 1 *Co.* 95. a. 99. b. *Cro. Car.* 87. Kirton's cafe. And *poft.* 173. (*a*).

of

of any remainder. So alſo in caſe of eſcheat; if the lord had entered for default of heirs, and a poſthumous heir was born, ſuch poſthumous heir might have entered, (as he ſtill may enter,) upon the lord, and revived the eſtate.

But in order to illuſtrate this matter the more clearly, and to point out the principles on which this doctrine depended, it will be neceſſary to obſerve, that he to whom a remainder is limited muſt take at the time when ſuch remainder ought to veſt IN INTEREST. [134]

When a contingent remainder muſt veſt.

It is ſufficiently eſtabliſhed that a remainder muſt veſt during the particular eſtate, or *eo inſtanti* that it determine; *i.e.* that no chaſm or period can be admitted between the expiration of the particular eſtate, and the veſting of the remainder (*b*).

So

(*b*) *Fearne*, 233. *Plowd.* 25. 33. 155. 485. 489. 1 *Co.* 66. b. 8 *Co.* 75. a. 2 *Bla. Comm.* 168. ch. 11. See *Douglas*, 337. Hodgſon & *Ux.* v. Ambroſe & *al.*

And

When the grantee muſt take.

So it is equally clear that he who takes a remainder, (*i. e.* at its creation, and not

And the caſe of *Reeve* and *Long*, in *Salkeld*, *Carthew*, *Levinz*, &c.

And the reaſon why ſuch a chaſm is not permitted is, that the freehold may not be in abeyance. But on a feoffment to uſes, before the ſtatute 27 *Hen.* 8. c. 10. the legal eſtate was veſted in the feoffees; and, therefore, as the intereſt of the *ceſtuy que uſe* was not within the reaſon, it was not within the rule. And ſo of a *truſt* at this day. 1 *Atk.* 590. Hopkins *al.* Dare *v.* Hopkins. 1 *Fearne*, 427. 449. *Cas. Temp. Talb.* 151. Chapman *v.* Bliſſett. And ſee *Moore*, 720. *pl.* 1006.

But this rule extends to *remainders* created *by will*, as well as to thoſe created *by deed*; though it cannot extend to an *executory deviſe*; for an executory deviſe is *not* a remainder, the very nature of an executory deviſe requiring that there be no *particular eſtate*: for if there *be* a particular eſtate, the limitation over ſhall be conſidered *as a remainder*, and *not* as an executory deviſe. And a limitation ſhall never be conſidered as an executory deviſe where it can, in any wiſe, be ſupported as a remainder. See Purefoy & Rogers, 2 *Saund.*

In the caſe of an executory deviſe, the freehold ſhall deſcend to the heir till the contingency happen. *Lutwich.* 798. Clarke & Smith.

That the rule extends to copyholds, See 1 *Watk. Copyh. ch.* 5.

on

on a mefne grant,) muft take at the time of its vefting an intereft: thus, one Jobfon devifed certain lands in tail, remainder to the next of his kin of his name; and, at the time of the devife, the next of his kin was his brother's daughter, who was then married to I. S. The devifor died. The tenant in tail died afterwards [135] without iffue. And the queftion, on a fpecial verdict, was, Whether the daughter fhould have the land? And it was adjudged, without argument, that fhe fhould *not:* "For fhe was not *then* of the name of the devifor, but of her hufband's name. *But if fhe had been unmarried* AT THE TIME OF THE DEVISE AND DEATH OF THE DONOR, *although fhe* HAD *been married at the time of* THE DEATH OF THE TENANT IN TAIL WITHOUT ISSUE, *yet fhe fhould have had the land*(c).

And

(c) *Jobfon's* cafe, *Cro. Eliz.* 576. See *Ibid.* 532. Bon *v.* Smith. S. P. And fee 1 *Vef.* 335. 359. Pyot *v.* Pyot; and *Powell on Devifes*, 347. 3 *Com. Dig.* 37. Devife, (N. 21.) 1 *Strange*, 30. Goodright *v.* Wright.

When the devisee.

And as the devise is consummated on the death of the devisor, and the estate devised (supposing it not executory or contingent) must vest in interest at such his death in the person to whom given,
[136] or not at all; so there must, by the terms, be a person then *in esse* who is capable of taking it, agreeably to the last-cited case. Thus, on a devise to A. in tail, with remainder to B. in tail, with remainder to the right heirs of A. in fee: A. died without issue, living testator: B. after making of the will, had issue C. (who was also heir at law to A.) and died in the life-time of the testator also: and it was resolved, that C. could *not* claim, either as the issue of B. nor as heir to A. as both died in the

Wright. 1 *Vef.* 114. N. Ellison *v.* Airey. 2 *Vef.* 210. Lord Teynham *v.* Webb. 10 *Mod. (Lucas)* 376. Goodright *v.* Wright. 1 *Vent.* 229. See *Cro. Car.* 410—13. Reeve & Malster; and *Robinf. on Gavelk.* Appendix. *Cro. Eliz.* 334—5. *Dyer*, 129. *pl.* 63. Bonvyll *v.* Payne. *Hobart*, 33. And 30 *Aff.* 47. 30 *Ed.* 3. f. 27. cited there. *Brooke*, *Defcent*, 24. *Done*, 21. *Co. Litt.* 10. b. and note (2). 8 *Co.* 75. a. Lord Stafford's case.

testator's

teftator's life-time; but that the *teftator*'s heir at law fhould have the land (*d*).

So, when a remainder was contingent, as being limited to an uncertain perfon, and afterwards vefted in any one anfwering the defcription required at the time it ought to have vefted in intereft, in them it fhould have remained; and could not have been afterwards devefted: as if lands were given to A. for life, with remainder to the heirs of B. and on the death of B. his daughter was heir, his wife being *enfeint* with a fon: in this cafe, immediately on the death of B. the remainder vefted in intereft in the perfon who was *then* his heir; and as B. took no eftate himfelf, his heir took the remainder BY PURCHASE: the remainder, therefore, vefting by *purchafe* in the daughter, the after-born fon could *not* have de-

An after-born nearer heir could not have entered on a purchafer.

[137]

(*d*) See 10 *Mod.* (*Lucas*) 370. Goodright *v.* Wright. *Plowd.* 341. Brett *v.* Rigden; and the books referred to in the margin of the Englifh edition. 3 *Com. Dig.* 16. Devife, (K.) 1 *Co.* 105. b. *Touchft.* 414. 452. (N. 2.) *Dougl.* 337. Hodgfon *v.* Ambrofe.

vefted

vested it(*e*). For as a contingent remainder must vest during the particular estate, or *eo instanti* that it determines, it must at that time vest in such person who is *then* capable of taking it, or not at all; and when it once so vested in any, in them should it have remained, and could not have been afterwards devested: so here it must have vested, on B.'s death, in his daughter, who was *at that time* his heir; and, consequently, should the posthumous son have been permitted to devest it, the devesting of it could not have been till *after* the period described; and, therefore, should
[138] not have been permitted at all: for so soon

(*e*) See 1 *Strange*, 30. Goodright *v.* Wright. *Kitch.* 108. b. *Brooke*, *Descent*, 2. 24. 58. *Entre Cong.* 92. 1 *Co.* 95. a. 137. b. 3 *Co.* 61. a. *Plowd.* 51. 56. 485. 489. *Hob.* 31, and 33. Counden & Clerke. 3 *Com. Dig.* 51. Descent, (C. 2.) *Dyer*, 129. *pl.* 63. Bonvyll *v.* Payne. *Cro. Eliz.* 334—5. Frederick *v.* Frederick. 1 *Ves.* 85—6. Miller *v.* Turner. *Dougl.* 499. and note (1). Doe *v.* Fonnereau. 2 *Lev.* 408. And 1 *Salk.* 228. second resolution in the case of Reeve and Long.

Nor should he have devested an estate to which a person had been *remitted*. See *Co. Litt.* 357. a. 3 *Leon.* 2. ca. 5. 1 *Anders.* 31. ca. 76.

as

as B. died, ſo ſoon had he an heir; and ſo ſoon as he had an heir, (for he could not have had one *before* his death, ſince *nemo eſt hæres viventis,)* ſo ſoon did it become veſted; and ſo ſoon as it became veſted, ſo ſoon was it immutably fixed in ſuch heir.

But he might have entered on a perſon taking by deſcent, or *per formam doni.*

When a daughter, therefore, took BY PURCHASE, as being *the-then* heir of her father or of the perſon deſcribed, a poſthumous ſon was *not* permitted to deveſt the lands; but when ſhe took as heir BY DESCENT, OR PER FORMAM DONI, ſuch after-born ſon *ſhould* have deveſted the eſtate(*f*). And in *this* point lay the diſ-

(*f*) *Brooke, Deſcent*, 24. and 58. *Kitch.* 108—9. *Doct. and Stud.* Dial. 1. ch. 7. See *Plowd.* 56. b. *Co. Litt.* 11. b. 2 *Bla. Comm.* 208, ch. 14. *Dyer*, 373—4. *pl.* 15. *Hob.* 31. Counden & Cleke.

If ſhe recovered in value, before the birth of the ſon, by reaſon of the warranty of the anceſtor, the ſon might have entered on her, for ſhe recovered *as heir. Plowd. Quæries, Qu.* 113.

So alſo of lands in Borough Engliſh, a poſthumous ſon ſhall enter on his elder brother. See *Robinſ. Gavelk.* Appendix, 14.

tinction:

tinction: though this distinction *seems* now no more (*g*).

[139] The posthumous issue might have entered on the reversioner.

Again, a nearly-similar distinction seems to have existed with regard to the right of entry of a posthumous son on the reversioner or remainder-man, in case of their having possessed themselves of the estate on failure of issue living at the death of the tenant in tail whom the posthumous son claimed to succeed to in the inheritance: As if an estate was given to A. in tail, and A. died without issue born at his death, but leaving his wife *enseint* with a son who was afterwards born; on A.'s death, as there was *then* no issue of his body *in esse*, the reversioner might have entered; but the after-born son might again have entered on such reversioner, and revived the entail; so that his enjoyment of the land should be considered as a continuance of the estate so given in tail: and, consequently,

(*g*) See the *Stat.* 10 & 11 *Will.* 3. c. 16. And 1 *Vesey*, 85—6. Miller *v.* Turner. 2 *Ves.* 230. Robinson *v.* Robinson. 1 *Durnford & East*, 633—4. Roe *v.* Quartley.

if

if A. had made any leafes which he might have lawfully made, they would, when the reverfioner entered, and during his poffefsion, have been void as to him; yet, on the birth of fuch pofthumous fon, as the eftate-tail revived, they would have revived alfo, and bound fuch fon and his iffue as tenants in tail(*h*).—And fuch is [140] the prefent law.

And analogous to this feems the cafe of a bafe-fee: As to I. S. in fee fo long as A. B. have iffue of his body: and A. B. die without iffue born, but leaving his wife *enfeint:* it fhould feem that, on the iffue been actually born, I. S. might enter on the perfon entitled in reverter, for the fame reafons as before noticed with refpect to the reverfion on an eftate-tail. The contrary, indeed, was affirmed by *Fenner*, J. (*i*), from 17 *Ed.* III.; but what was affirmed by *Fenner* was denied as law by *Rhodes* and *Anderfon*, Juftices.

(*h*) 7 *Co.* 8, 9. *Co. Litt.* 46. a. 2 *Anderf.* 9, 10. *pl.* 6. See 1 *Strange*, 349, and 351.

(*i*) 1 *Leon.* 74.

P I cannot

I cannot find the cafe cited by *Fenner* reported in the Year-book, but I prefume the principle on which it went was, that a condition once broken cannot be revived. Yet even fuch pofition, as to this point at leaft, feems queftionable (*k*). And, however the law might formerly have been taken, there can be, I conceive, but little doubt that the child *in ventre fa mere* would now be confidered as fo far, at leaft, in exiftence at the deceafe of A. B. as to preclude the perfon claiming from averring that A. B. *died without iffue*.

Or on the lord in cafe of efcheat.

So, alfo, when the lord entered in cafe of efcheat for default of heirs of the tenant, an after-born heir might have entered, as he ftill may enter, upon fuch lord; in the fame manner as the pofthumous iffue of tenant in tail might have entered on the reverfioner (*l*).

(*k*) *Vide Pafch.* 9 *Hen.* 7. *pl.* 11. *fol.* 25. a. And *ante*, 133. N. (*a*).

(*l*) See 1 *Strange*, 349. Thornby *v.* Fleetwood. *Dyer*, 94. *pl.* 33, and 34. Chafyn and Lord Sturton. 3 *Inft.* 231. 1 *Co.* 98. b.

Again; with respect to remainders: If a remainder had been so limited as to have vested IN INTEREST on such an event, the person who was entitled at the time it should so have vested should have held it against a posthumous issue, who should not have been permitted to have devested such remainder (*m*). But if a remainder once became vested in interest, THE POSSESSION might again have been devested by such posthumous person as well as the estate in possession of the reversioner: As if lands were given to A. in tail, with remainder to B. in fee; and A. died without issue, (but leaving his wife *enseint*,) on which B. had entered: the issue afterwards born might have entered on B. and revived the estate (*n*). For the rule that a remainder must vest during the particular estate, or *eo instanti* that it determines, was already satisfied; since such rule relates only to its vesting in interest. And the position, that when a remainder is once vested it shall not be afterwards devested,

But not on the remainder-man who took *by purchase*.

Aliter of him who took a remainder *by descent*.

[141]

(*m*) See *ante*, p. 136.

(*n*) See *Co. Litt.* 281. a.

was confined to its vesting in interest also. As the estate in interest, therefore, is not devested, or at all affected, by the entry of such posthumous son, any more than it would be by the entry of the issue born during the particular estate, there is no reason why the enjoyment of the possession should not be ruled by the same circumstances, since the principles of each are the same.

Statute of *Will.* 3.

Such then appears to have been the law as to these subjects before the statute of 10 & 11 Will. 3. c. 16.; and we may observe, that where the posthumous issue might have entered at common-law they [142] are still entitled to enter; as the law, where altered, has been altered for their benefit, and not for their disadvantage. And it is now laid down, apparently as a fixed principle, that a child *in ventre sa mere* shall be considered as absolutely born (*o*).

The

(*o*) 1 *Ves.* 85—6. Miller *v.* Turner. And 1 *Durnf.* & *East.* 633—4. Roe *v.* Quartley.

And

The ſtatute of 10 & 11 Will. 3. c. 16. has expreſsly provided for certain caſes with reſpect to remainders; and the light in which that ſtatute has been taken is very favourable to the poſthumous iſſue; inaſmuch that the diſtinction mentioned between a remainder's being veſted or not veſted in intereſt, before the birth of ſuch iſſue, ſeems now, if not abſolutely, yet certainly in a very great degree, to be done away: ſuch child being conſidered as exiſting, and the remainder allowed to veſt in him in his mother's womb(*p*).

But with reſpect to the ſtatute of *Will.* 3. we may obſerve, that it ſeems to be in favour of ſuch poſthumous children only who *take* by way of remainder, and has

And ſee alſo the caſe of Clarke *v.* Blake. 2 *Bro. Ch.* Ca. 320. and 2 *Veſ. Jun.* 673. and Baſſett *v.* Baſſett. 3 *Atk.* 203. and that of Doe *d.* Lancaſhire *v.* Lancaſhire. 5 *Durnf. & Eaſt.* 49. and Doe *d.* Clark *v.* Clark. 2 *Hen. Blackſt.* 399. and *Boſanquet & Puller.* 243. Whitelock *v.* Heddon. And 4 *Veſ. Jun.* 227. Thelluſon *v.* Woodford.

(*p*) See 2 *Bla. Comm.* 169. ch. 11. *Co. Litt.* 11. b. note (4); and 298. a. note (3).

 nothing

nothing to do with any remainders *limited to others* dependant upon their birth. And as it thus ſeems to relate only to ſuch poſthumous children who take *the remainder over*, ſo it is expreſsly confined to the limitation of *a remainder*, and has nothing to do with *a deſcent*. The doctrine, therefore, relative to a poſthumous child taking by deſcent, remains as at common-law.

With reſpect, however, to remainders limited to ſuch poſthumous iſſue, the ſame doctrine applies, whether ſuch remainders be created by deed or by will (*q*).

Poſthumous iſſue entering on the perſon taking a contingent or executory fee.

[143] If an eſtate be deviſed to A. in fee, and, if he die without leaving iſſue, then to B. in fee; and A. die without iſſue, but leaving his wife *enſeint*, and B. enter; it is conceived that the poſthumous iſſue of A. may enter on B. and take the anterior fee. And this, it is apprehended, would have been the caſe even *before* the ſtatute of WILL. 3. (*r*). For though a fee thus limited

(*q*) See *Butl.* N. (3), to *Co. Litt.* 298. a.

(*r*) See 1 *Veſ.* 85—6. Miller *v.* Turner. 2 *Veſ.* 230. Robinſon *v*. Robinſon. 1 *Durnf. & Eaſt*, 634. Roe

mited after a fee cannot properly be ſaid to be *veſted* during the exiſtence of the firſt(*ſ*), "yet it is carrying it too far, perhaps, to ſay, that it is *not veſted at all* (*t*);" and we have ſeen that it is certainly fixed, as to the intereſt or property, in the perſon to whom limited, in, at leaſt, a qualified or ſecondary ſenſe; as to be tranſmiſsible, &c. (*u*). And as there is a capacity in the latter fee to become veſted in poſſeſsion, ſhould the anterior one happen to determine, (which is the chief [144] characteriſtic of a *veſted* REMAINDER(*x*)—), it ſeems to follow, from the principles already noticed, that it was *ſo far* fixed in B. before the happening of the contin-

Roe *v.* Quartley. 1 *P. Wms.* 486—7. Burdett *v.* Hopegood. See 1 *Leon.* 74. caſe 101. and cited in *Preſton on Eſtates*, 21.; and caſe of Buckworth and Thirkwell, in *Collect. Jurid.* vol. i. p. 332.

(*ſ*) 1 *Fearne on Conting. Rem.* 341. (4th edit.) 160. (3d edit.) *Lord Raym.* 203. Luddington *v.* Kime.

(*t*) See *ante*, ch. 1. ſ. 1. p. 5. and note (*g*).

(*u*) See *ante*, ch. 1. ſ. 1. p. 5.; ch. 3. ſ. 2. p. 122.

(*x*) 1 *Fearne*, 328. (4th edit.) 148. (3d edit.)

 gency,

gency, (of A.'s death without iſſue,) as to have its poſſeſsion deveſtable by the poſthumous iſſue of A. in like manner as the *poſſeſsion* of the remainder veſted in intereſt before that occurrence is ſuffered to be deveſted (*y*). And as the fixture of ſuch an intereſt is antecedent to ſuch contingent event, the enjoyment of ſuch executory fee ſhall be ruled by it. And as to the difference with reſpect to the remainder and executory deviſe, as that the poſſeſsion only of the firſt ſhould be affected by the birth of a poſthumous perſon, and, of the latter, that not only the poſſeſsion, but the intereſt alſo, ſhall be deveſted, it is eaſily accounted for from the eſſential difference in the nature of each eſtate.

If A. had made a feoffment, before the ſtatute, to the uſes of his will, and declared his will to have been, that his daughter (he having no ſon) ſhould have the lands; and died; and after his death a ſon had

(*y*) See *ante*, p. 140.

been born, the feoffees ſhould have enfeoffed the ſon (*z*).

Baſtard and mulier.

As to *baſtard eignè* and *mulier puiſnè*, we may obſerve, that in order to bar the mulier and his iſſue, there muſt not only be a dying ſeiſed (either by a natural or civil death, and that of lands in *fee-ſimple)* by the baſtard, but alſo a deſcent caſt; and, conſequently, where theſe two requiſites do not concur, the mulier or his iſſue may enter: and, therefore, if the baſtard die ſeiſed without iſſue, and the lord enter by eſcheat, the mulier is *not* barred: there being no deſcent (*a*). But if the baſtard had entered, and the mulier died without iſſue but leaving his wife *enſeint*, and then the baſtard had iſſue and died ſeiſed, after whoſe death the poſthumous iſſue of the mulier was born, his right was barred, and he was not permitted to enter; as there were both a dying ſeiſed and a deſcent; and, conſequently, the [145]

(*z*) See *Fitzh. Abr. Subpœna*, 23.

(*a*) *Vide Mich.* 37 *Hen.* VI. *pl.* 1.

right

right of the baſtard eſtabliſhed. But had the *baſtard* died ſeiſed without iſſue, but leaving *his* wife *enſeint*, and then the mulier had entered, and afterwards the ſon of the baſtard had been born, ſuch ſon could *not* have entered on the mulier, he not being barred; there being no deſcent caſt when the mulier entered. For though the law gave the eſtate to the iſſue of the baſtard when both theſe requiſites concurred, as a puniſhment for the mulier's
[146] negligence, &c. yet when both theſe requiſites did *not* concur, the iſſue of the baſtard had no title at all (*b*).

Upon the whole, therefore, we may conclude, that wherever the poſthumous iſſue might have entered at common-law, ſuch iſſue may ſtill enter; and that the al-

(*b*) See *Co. Litt.* 244. a. and 248. b. 8 *Co.* 101. a. and b. *Gilb. Ten.* 27. *Brooke*, *Deſcent*, 41. 2 *Bla. Comm.* 248. c. 15. *Plowd.* 57. a. 372. a. And *quære*, as to the law at this day, with reſpect to the poſthumous iſſue; for if the liberality of the times ſhould conſider ſuch iſſue *as born*, it would perhaps deem it a ſufficient *deſcent*.

terations

terations which have taken place, have taken place in their favour.

As to the intermediate profits from the death of the anceftor to the birth of a pofthumous heir, it feems that fuch heir is *not* entitled to them; but that they fhall be enjoyed by the perfon feifed of the eftate for the time being, to his own ufe: as if the uncle enters on the death of the father, and afterwards a fon be born, the uncle fhall be entitled to the profits from the father's death to the birth of the fon (*c*). Mefne profits.

(*c*) See *Co. Litt.* 11. b. note (4).

" *Babington.* Si home ad iffue file & devie f. feme enfeint la fille poit loialm. ent. & fi ele devie f. heire poit entre & prende le p.fts pur le temps; & puis fi la feme enfient p. l'aunc. p.amont. eft delivere du: fitz, fon fitz poet entre non obftante q. l'heire de fon foer eft eins p. defc. mez il naver. acc. d'accompt. ne nul [autre] remedie pur les iffues en le mefne temps devaunt le neftr. pur. c. q. lour. ent. fuit cog. tanq. il fuit nee." *Trin.* 9 *Hen.* VI. *fol.* 25. a.

And when we confider that the daughter and her heir were juftly entitled to the freehold *till* the fon was born, it feems to follow of neceffity that they were juftly

justly entitled also to the profits, to enable them to discharge the services of the lands. While they were in the possession of the feud they were certainly subject to the services; and the person discharging the services by right was, as certainly, entitled to the profits. See *Gilb. Ten.* 45—6. and 3 *Blackst. Comm.* 187—8: ch. 10. 3 *Atk.* 203. Bassett *v.* Bassett. and *Watk. on the King's claim as Guardian of the Duchy of Cornwall.*

CHAP.

CHAP. V. [147]

OF DESCENTS *EX PARTE MATERNA*; AND WHAT SHALL CHANGE SUCH DESCENT, AND GIVE THE PREFERENCE TO THE PATERNAL LINE.

IF a perſon ſucceeds to an eſtate *as* HEIR *to his mother* and dies without iſſue, his heirs on the part of his mother ſhall inherit ſuch eſtate, and not his heirs on the part of his father: and, *e converſo*, if it deſcends from his father, it ſhall devolve, on the death of the ſon, to his heirs of the paternal line (*a*). Deſcent *ex parte materna.*

But if a perſon takes an eſtate BY PURCHASE, he takes it *ut feudum antiquum*; and, conſequently, it ſhall deſcend to his Purchaſer takes *ut antiquum.*

(*a*) See *ante*, ch. 2. p. 89. *Litt.* ſ. 4. 2 *Bla. Comm.* c. 14. p. 222, and 234.

heirs

heirs *on the part* OF HIS FATHER, as of the worthieſt blood; the law never calling in the heirs on the part of the mother to the inheritance of the ſon, unleſs ſuch inheritance had actually deſcended from the mother, or until the blood of the father be exhauſted. And when the ſon takes BY PURCHASE, it could not poſsibly (by the terms) have *actually* deſcended to him from the mother, or from any one elſe; but, as he takes it UT ANTIQUUM, the *ſuppoſed* or *preſumed* deſcent is from the father, to whoſe line the preference in law is given; and, therefore, as it has been ſaid, the eſtate acquired by the ſon *as a purchaſer* ſhall deſcend to his heirs on the part of his father (*b*).

Paternal line preferred.

[148]

For ſhould a ſon take an eſtate by purchaſe, and it be expreſsly limited to him and his heirs of the part of his mother, yet his heirs of the part of his father ſhall ſucceed to the eſtate: for it is not in the power of an individual (nor even of the

(*b*) *Litt.* ſ. 4. *Co. Litt.* 12.; and ſee *ante*, ch. 2. note (*a*), and art. vii.

king

king (*c*)—) to inſtitute a new kind of inheritance not allowed by the law (*d*).

Suppoſing

(*c*) *Bro. Patentes & Grantes le Roy*, 104. *Hob.* 224. 1 *Co.* 43. b. Lord Lovel's caſe, cited; and next note (*d*).

(*d*) *Co. Litt.* 13. a. 27. a. *Plowd.* 251. 335. 7 *Co.* 40. b. Beresford's caſe. 1 *Brownl.* 45. 2 *Ibid.* 334. 2 J. *Blackſt. Rep.* 1229. Roe *d.* Aiſtrop *v.* Aiſtrop.

So if lands deſcend differently from the courſe of the common-law, as in Borough Engliſh, for inſtance, the perſon ſeiſed of ſuch lands cannot alter the deſcent: as if one ſeiſed in Borough Engliſh make a feoffment to the uſe of himſelf and the heirs male of his body, "according to the courſe of the common-law;" the words "according to the courſe of the common-law," are void; and the youngeſt, and not the eldeſt ſon, ſhall take the entail. *Dyer*, 179. *pl.* 45. *Jenk. Cent.* 220. *pl.* 70. S. C.; and ſee further, Of Gavelkind and Borough Engliſh, *Robinſ. on Gavelk.* b. 1. c. 5. p. 52. 65. 74. c. 6. p. 94—5. and 2 *Bl. Rep.* 1228. Roe *d.* Aiſtrop *v.* Aiſtrop.

Of a remainder in gavelkind, &c.

But if A REMAINDER be *limited* of lands in Borough Engliſh or gavelkind "to the right heirs" of a particular perſon, the *eldeſt ſon* ſhall take. For ſuch cuſtoms are that lands ſhall DESCEND to all the ſons, or to the youngeſt of them; and *have nothing to do with a* PURCHASE, which ſuch remainder evidently is: and, conſequently, being without the cuſtom, it is the province of THE COMMON-LAW to point out the

[149] Suppoſing then an eſtate deſcending *ex parte materna*, we will enquire what will be

the perſon who ſhall now take as heir. See *Bro. Diſc.* 59. *Done*, 42. *Co. Litt.* 10. a. *Hob.* 31. 1 *Co.* 101. a. 103. a. and ſee *Robinſ. on Gavelk.* b. 1. c. 6. p. 117.; and 1 *Atkins*, 607. Roberts *v.* Dixwell; and *Preced. in Chanc.* 464. Brown *v.* Barkham. *Davy's Rep.* 31. a. *Kitch.* 86. a.

And when the law *aſcertains* who ſhall take a remainder, we muſt be careful to recollect that it is taken BY PURCHASE. For though this is in itſelf ſo evident, yet we may, perhaps, from want of ſufficient attention, be led to ſuppoſe that if there are more than one who are heirs at law to the perſon deſcribed, they ſhall take ſuch remainder as they would have ſucceeded to an inheritance: for, notwithſtanding we muſt thus have recourſe to *the law of* DESCENTS to *aſcertain* the perſons who are to take, yet, *when they are once aſcertained*, we have nothing further to do with it; for the perſons then take AS PURCHASERS. And, therefore, if a remainder be limited to the right heirs of A. and A. die during the particular eſtate, leaving ſeveral ſons; as the law declares the *eldeſt only* to be his heir, the eldeſt only ſhall take ſuch remainder. See *Co. Litt.* 220. a. 1 *Co.* 104.; and 1 *Strange*, 42. Brown *v.* Barkham.

But in caſe A. had died, leaving two daughters, as the law conſiders them *both* as his heir, they ſhall *both* take; but as they take *as purchaſers*, they ſhall not have it *in parcenary*, (for to do this they muſt have taken

be ſufficient to break ſuch deſcent, and [150]
cauſe the eſtate to go in future to the heirs
ex

What ſhall break the deſcent.

taken *by deſcent*, *Litt.* ſec. 254.) but *as joint-tenants*, *or as tenants in common.* See 3 *Leon*, 14. caſe 32. Stowell *v.* Earl of Hartford; and ſee alſo *Hob.* 33. Counden & Clerke. *Brooke*, *Deſcent*, 24. and *Done*, 21. *F. N. B.* 219. b. *Co. Litt.* 163. b.

So if A. had had three daughters, and the eldeſt of them had died, leaving ſeveral ſons; the ſecond leaving two daughters; and the youngeſt be living; and *then* the remainder *veſt*: we muſt enquire who were *then* (for it matters not who were before, (at his death,) or who might be thereafter. See *ante*, ch. 4. p. 135.; and *Brooke*, *Done*, 21.) the right heirs of A.? And theſe we find to have been the eldeſt ſon of the eldeſt daughter, the two daughters of the ſecond, and the youngeſt daughter herſelf: theſe, therefore, ſhould take the remainder; and they ſhould take it in equal portions as joint-tenants. For though had they ſucceeded as to the inheritance of A. they would have taken *per ſtirpes*, and not *per capita* (the eldeſt ſon one-third part, the two daughters one other third part between them, and the aunt the other third); yet *ſuch* would be the manner in which they would have taken BY DESCENT, and *not that* in which they ſhould take BY PURCHASE: for being then all equally the heirs of *A.* they all equally anſwered the deſcription given; and, conſequently, all were equally entitled to take; and, where more than one take together, *by purchaſe*, it muſt be either in joint-tenancy or common.

[151] *ex parte paterna.*—And, in order to effect this purpose, the estate must be made to fix

And note: In bequests of personal property to "the relations" or "next of kin," of any one, the statute of distribution furnishes the rule as to the objects of the bequest, *i. e.* ascertains the persons comprehended in those terms; but when they are ascertained, the statute ceases to be a rule: And the persons taking shall take *per capita*, though the act might, in a similar case, order the distribution of the effects of an intestate to be made according to their stocks or roots. See *Cas. Temp. Talb.* 251. Thomas *v.* Hole. *Prec. Chanc.* 401. Roach *v.* Hammond. 1 *Atk.* 470. Harding *v.* Glyn. 1 *Pr. Wms.* 327. anonymous; and see Mr. *Coxe's* N. (1) to 2 *Pr. Wms.* 385. Blackler *v.* Webb, and the books by him cited.

"*Issue.*" 3 *Ves. Jun.* 257. Davenport *v.* Hanbury. And see *post*, (Of persons taking by devise.)

So if a gift be made in tail, or for life, to N. with remainder over to the right heirs of P. and M. their right heirs shall take as joint-tenants or as tenants in common. *Bro. Done*, 21. *Joint-ten.* 12. *Formedone*, 30. See *F. N. B.* 219. B. *Co. Litt.* 188. a. 1 *Fearne*, 460.

When, therefore, a remainder is limited to the right heirs of any one, (who takes no estate himself,) the words "the heirs" are only as *a descriptio personæ*; and, consequently, the person taking must answer such description. If it be limited of lands *in Gavelkind*, or *Borough English*, "to the right heirs of A."

fix in the perſon taking BY PURCHASE; [152]
or, in other terms, the eſtate *deſcending*
muſt

A." without any thing farther; the heirs of A. AT COMMON-LAW (for we have now nothing to do with the cuſtom) ſhall take. But if a deviſe be *(though of lands at common-law)* to "the heirs of A. *according to the cuſtom of Borough Engliſh*," or "*of Gavelkind*;" this being as a *deſcriptio perſonæ*, the perſon taking muſt anſwer it: and the *youngeſt ſon*, in the firſt caſe, and *all the ſons* in the latter, ſhall take: but ſtill they muſt take *as purchaſers*. See *Preced. in Chanc.* 464. Brown *v.* Barkham. *Robinſ. on Gavelk.* b. 1. c. 6. p. 117. and *Co. Litt.* 10. a. note (4).

Next of blood.

And note alſo a difference between a limitation to "the heirs of A." and to "the next of blood." For the latter limitation has nothing to do with the laws of deſcent: as the "heir of A." may be one perſon, and "the next of his blood" another.

Thus where a remainder was limited "*propinquioribus de ſanguine puerorum*" of the deviſor, who left two ſons and a daughter; the ſons had no children, but the daughter had two daughters; it was held, that neither the ſons nor the daughter ſhould take, for they were *pueri*, and not *propinquioribus de ſanguine puerorum*: but that the two daughters of the daughter ſhould take for their lives; and if there had been alſo ſons of ſons or daughters, they ſhould *all have taken together*; but that children born after the remainder veſted ſhould take nothing. For that the *neareſt of degree* in blood ſhould take, and the *worthieſt* in order

of

[153] must be DESTROYED *or* EXTINGUISHED, and the estate which *is to descend* to the paternal

of descent: the words here importing no respect of *dignity*, but of *proximity of blood*. 30 *Ass.* 47. and 30 *Ed.* 3. 27. *Brooke*, *Done*, 21. *Discent*, 24. *Hob.* 33. *Co. Litt.* 10. b. and note (2).

So if a remainder be limited to "the next of blood of A." who has two sons, B. and C. and dies: B. has two sons, D. and E. and dies: the eldest son of B. has issue and dies: E. shall take, in exclusion of the issue of D. though such issue is the heir at law to A. *Co. Litt.* 10. *Kitch.* 86. a.

So if A. had had two sons, and the eldest had issue and died; the younger son should have had the remainder, and not the issue of the eldest: for the youngest was nearer of blood to A. than the grandson. *Brooke*, *Done*, 21.

So if A. had a father and uncle, and died without issue, the father, and not the uncle, should take: for the father is next of blood to the son. *Litt.* s. 3. *Co. Litt.* 10. b. 11. a. note (1); and 3 *Rep.* 40. b.

So if he had had a father and a brother, the father should take: for the father is nearer in proximity than a brother. 1 *Vent.* 414. Collingwood *v.* Pace. 3 *Co.* 40.

So had he a brother of the half-blood, and an uncle of the whole, the brother of the half-blood should take; for he is nearer in degree than the uncle. See 1 *Vent.* 424. Collingwood *v.* Pace; and see also *Show.* *Cases*

paternal heirs, muſt be an eſtate *entirely new*.

[154] Words of purchaſe and of limitation.

But to particularize the ſeveral caſes in which it has been determined when the heirs ſhall take by deſcent, and when by purchaſe, would be beſide the intention of the preſent work. Nor ſhall I

Caſes in Parliam. 108—10. Watts & *al. v.* Crooke; and 2 *Pr. Wms.* 735. Cowper *v.* Earl Cowper.

Deſcent of a remainder, or reverſion in gavelkind.

But if a remainder DESCENDS, the deſcent ſhall be according to the nature of the lands; as if lands in gavelkind or Borough Engliſh be limited to A. for life, with remainder to B. in fee; and B. die in the lifetime of A.: here, the remainder veſting in B. his heirs take it, on his death, *by deſcent*; and *all* the ſons, (in the one caſe,) or the *youngeſt*, (in the other,) ſhall ſucceed to it. It is ſcarcely neceſſary to add, that it is the ſame as to a reverſion deſcending. See *Dyer*, 128. *pl.* 58.; and *Robinſ. on Gavelk.* b. 1. c. 5. p. 78. and authors referred to by him; and *Co. Litt.* 22. b. 23. a. 3 *Pr. Wms.* 63. Cheſter *v.* Cheſter; and ſee 6 *Viner's Abr.* 194. Copyhold, (C. e.) *pl.* 16. (cites 1 *Freem.* 45. *pl.* 55. Fox & Smith, which ſee). *Semb. Contra.* But *quere* as to that caſe.

presume to mark the precise line of distinction through all its meanders,

"Hooks, angles, crooks, and involutions wild,"

which separates the "words of purchase" from "words of limitation;" (but which, it is remarked, have been very good clients in Westminster-hall(*e*)—). Yet, in order to enable us more easily to discriminate between these celebrated terms, and ascertain the requisites to fix an estate descending *ex parte materna* in the heir, as a purchaser, I will endeavour to lay down some certain rules or principles(*f*), which
[155] may serve as guides in this pursuit, which is certainly as important, as it frequently is difficult and arduous. And instead of crowding the margin with references to the numerous cases wherein

(*e*) 2 *Eunomus*, 41.

(*f*) LORD MANSFIELD, in the case of Long *v.* Laming, (2 *Burrow*, 1106,) said, "It is to be lamented that questions of this kind have occasioned so much litigation and expence; *the best way to settle them is to reduce the matter, if possible, to some* CERTAIN RULES."

"words

"words of purchaſe" and "words of limitation" have been the objects of diſcuſsion, or deſcending to the minutiæ of the ſubject, I ſhall content myſelf with laying down a few ſuch principles, and citing a few ſuch caſes, and then refer to ſuch authors as ſhall appear to be ſufficient to eſtabliſh what I aſſert.

First then, *a perſon ſhall take* BY PURCHASE *when he takes an eſtate which never veſted or attached, or might have veſted or attached, in the anceſtor.*

When a perſon ſhall take *by purchaſe.*

As if a ſon *buys* (which is the vulgar acceptation of the term purchaſe) an eſtate to him and his heirs(*g*).

So if a remainder be limited by a ſtranger to *the* RIGHT HEIRS *of A.* and A. have no eſtate in the premiſes himſelf: thus, if there be baron and feme, who have iſſue a ſon, and lands are letten for life, with remainder over to the heirs of the feme; before which remainder falls, the

Heirs general.

(*g*) See *Litt.* ſec. 4.

[156] baron and feme die; the ſon ſhall take AS A PURCHASER; and if he die without iſſue, his heirs on the part of the father (or baron) ſhall inherit, and not thoſe on the part of the mother (or feme)—(*h*).

Thus when an eſtate is limited *by a ſtranger* to the right heirs of a perſon *who takes no eſtate himſelf*, his heir neceſſarily takes by purchaſe: as there is nothing in the anceſtor, there is nothing to deſcend.

Heirs ſpecial. But if the limitation had been to the HEIRS SPECIAL of a perſon who took no eſtate himſelf, and in whom ſuch remainder could not even attach, yet, it is ſaid, that the heirs ſpecial ſhall not take abſolutely by purchaſe; but then it is as clear, that they ſhall not take abſolutely by deſcent. It is indeed a kind of neutral eſtate, which we ſcarcely know how to term. Sometimes the perſon taking this uncouth non-deſcript is ſaid to take by purchaſe; at others by deſcent; then again by neither, but in an intermediate manner

(*h*) *Co. Litt.* 13. a. and 298. a.

between

between both; and by Sir *M. Hale*(*i*) it is called—and called, says Mr. *Fearn*(*k*), with emphatical accuracy— "a *quasi* entail."

[157] But where an estate is limited to, or remains in, the ancestor, and another is limited to his heirs general or special, such estates shall, in many cases, coalesce; or, at least, the latter be considered as *fixed* in the ancestor; and the heirs shall be in BY DESCENT.

When a person shall take *by descent*.

As, "*when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, in fee or in tail, the words, "the heirs," are* WORDS OF LIMITATION OF THE ESTATE, AND NOT WORDS OF PURCHASE(*l*)."

Limitation to the heir fixing in the ancestor; *vide post.*

Rule in Shelly's case.

(*i*) *Hale's MSS.* in *Not.* (6). *Co. Litt.* 14. a.

(*k*) *Conting. Rem.* v. i. p. 108—113.

(*l*) Rule in Shelly's case; 1 *Co.* 104.; and see of this rule, *ante*, ch. 1. s. 1. p. 17. and authors there referred to.

And,

And, in order to illuſtrate this rule and aſsiſt us in determining when ſuch words (the heirs) ſhall be conſidered as words of purchaſe, and when as words of limitation, I ſhall ſpeak, firſt, as to the creation of ſuch eſtates; and, ſecondly, as to the eſtates themſelves.

Eſtates coaleſcing.

And firſt, as to the creation of ſuch eſtates:—

[158]

By what conveyance.

Both eſtates muſt be limited by, or derive their exiſtence from, THE SAME *conveyance; or the eſtate in the anceſtor be in him as a portion undiſpoſed of, of the eſtate moving from him, and by him ſo limited.*

For if an anceſtor have an eſtate for life, and an eſtate be limited of the ſame lands to his heirs *by* ANOTHER *conveyance,* the heirs ſhall, notwithſtanding, take BY PURCHASE, *and* NOT BY DESCENT (*m*).

(*m*) See the rule in Shelly's caſe, before; and 1 *Lord Raym.* 37. Moore and Parker; and ſee *Fearne,* 55. (3d edit.) 95. (4th edit.)

So

So if it be limited to A. for life, with remainder to the heirs of B. and A. *grant* his estate to B. the estates will *not* coalesce; but the heirs shall be in BY PURCHASE (*n*).

So where husband and wife were seised of a copyhold to them and the heirs of the husband; the husband, after a surrender to the use of his will, *devised* it to the heirs of the body of the wife, if they should attain to the age of fourteen years: The court agreed, that the devise did *not* operate as a remainder; for although the wife *had* an estate for life, yet this was A NEW DEVISE to take place after her death, and not a [159]
remainder joined to her estate (*o*).

So where the father *settled* lands on his son for life, retaining the reversion to himself, and afterwards *devised* them to the heirs male of such son; the estates did *not* unite;

(*n*) See preceding page, note (*m*).

(*o*) 1 *Levintz*, 135. Snow *v.* Cutler; *and cited in Fearne*, 55. (3d edit.) vol. i. p. 96. (4th edit.)

but

but the heirs male took the entail BY PURCHASE(*p*).

Power. But it ſeems that if lands be limited to A. for life, and, after A.'s deceaſe, *to ſuch uſes as B. ſhall appoint*, and B. appoint to the heirs of A. that theſe eſtates *ſhall* coaleſce. For B. being merely an inſtrument, *when* he appoints the eſtate the appointee is *in* from the grantor; and the eſtate ſo appointed ariſes, has its exiſtence, and takes effect, from the deed by which ſuch power was created; which, in the caſe put, was *the ſame* which limited the eſtate for life to A.(*q*).

[160] And this, though the perſon executing ſuch power limit it ſubject to the payment

(*p*) *Doug.* 487—509. Doe *v.* Fonnereau. But ſee *ante*, p. 156. See alſo 2 *Burr.* 873. Goodman & *al.* *v.* Goodright. *Ca. Temp. Talb.* 262. Lady Laneſborough *v.* Fox.

(*q*) See *Co. Litt.* 299. b. note (1). (Harg. and Butler's edit.) and *Fearne*, vol. i. p. 99. (4th edit.) 2 *Atk.* 565, and 568. Cook *v.* Duckenfield; and ſee 2 *Veſ.* 78. Duke of Marlborough *v.* Lord Godolphin.

of

of debts (for if the quality of the eſtate be not changed, the charging it with incumbrances will not alter the deſcent, as we ſhall preſently ſee).

As where a mother ſettled an eſtate to herſelf for life, remainder to truſtees for a term of years; remainder to her ſon for life; remainder to truſtees to preſerve contingent remainders; remainder to the firſt and other ſons of ſuch ſon, in tail-male; remainder to the heirs of his body generally; and in default of ſuch iſſue, to ſuch uſes, &c. as ſhe ſhould appoint. The mother appointed to her ſaid ſon (who was her heir at law) in fee, ſubject to debts. The ſon afterwards died without iſſue: and he was adjudged to have taken BY DESCENT, *and not by purchaſe*; and conſequently, ſuch eſtate would deſcend on his death to his heirs *ex parte materna* (r).

Secondly, as to the eſtates themſelves: What eſtates.

(r) 2 *Burr.* 879. Hurſt and another *v.* Earl of Winchelſea and others; and *Co. Litt.* 12. b. note (2).

1st, Both legal, &c.

First, *the estates must be* BOTH LEGAL, *or* BOTH EQUITABLE.

[161] And, therefore, if the estate of the ancestor be legal, and that to his heirs be equitable, or *vice versa*, they cannot coalesce; for being of different natures they cannot make *one* estate (*s*).

As, to the use of trustees during the life of A. upon trust to permit him to take the profits; remainder to the heirs of the body of A.; the estates will not unite; but the heirs shall be in BY PURCHASE (*t*).

2dly, Both freehold.

Secondly, *They must be* BOTH FREEHOLD. (See the rule in Shelly's case before.)

For if it be limited to the ancestor *for years*, with remainder to B. in tail; remainder

(*s*) See *Fearne on Conting. Rem.* 34. 81. (3d edit.) 68. 165. vol. i. (4th edit.) In illustrating this rule, the references are chiefly made to this invaluable work; as most of the cases are there elaborately considered and referred to.

(*t*) *Ibid.* 34. (3d edit.) 68. (4th edit.) and see 2 *Durnf. and East*, 444—451. Silvester *v.* Wilson.

mainder to the right heirs of ſuch anceſtor; the right heirs ſhall take BY PURCHASE, when the remainder veſts(*u*).

Thirdly, *The ſubſequent limitation to the heirs muſt be confined to thoſe of the anceſtor who takes a particular eſtate.* [162]

3dly, Eſtate to the heirs.

For if it be to feme for life, with remainder to the heirs of the bodies of baron *and* feme, the heirs of their bodies ſhall be in BY PURCHASE *and* NOT BY DESCENT; for the freehold was in the feme alone(*x*).

This neceſſarily follows from what has been ſaid: If the remainder be *not* confined to the heirs of the perſon taking a particular eſtate, then the remainder is, in ſome degree, to the heirs of a perſon *who does*

(*u*) *Co. Litt.* 319. b. 1 *Co.* 104. a. *Fearne*, 33. 253. (3d edit.) 65. 482. (4th edit.) vol. i. and *poſt.* p. 165.

(*x*) See 2 *Bla. Rep.* 728. 731, 732; Frogmorton *d.* Robinſon *v.* Wharrey; and ſee *Fearne*, 29. 46. 83. (3d edit.) and 44. 85. 177. (vol. i. 4th edit.) and ſee *Co. Litt.* 219. a. note (3); and 2 *Durnf. & Eaſt*, 435. *in the caſe of* Denn *v.* Gillot.

NOT *take a particular eſtate*; and conſequently not within our aſſertion: for the rule goes upon the ſuppoſition of the anceſtor's taking an eſtate himſelf. And although one anceſtor does (in the caſe above) take ſuch eſtate, yet the remainder is not merely to the heirs of ſuch ſingle anceſtor, but to the heirs of both; and therefore cannot attach ſingly in the particular tenant.

[163] 4thly, To the anceſtors. Joint and ſeveral. *But if the heirs* BE *confined to thoſe of the perſons taking a particular eſtate, it matters not whether the eſtates of the anceſtors be ſeveral (ſo they* ALL *take) or joint; nor whether the remainder over be to the heirs of all, or only of ſome, or one, of ſuch anceſtors.*

As to baron for life, remainder to feme for life, remainder to the heirs of the bodies of baron *and* feme, it ſeems, though the eſtate tail is not executed in them becauſe the limitations did not correſpond with each other, that yet it *veſts in them as a remainder*; (and it is ſaid, that on the death of one, it ſhall merge the particular

particular eſtate of the ſurvivor, and then become executed in poſſeſsion;) and, conſequently, the heirs of their bodies ſhall take by deſcent (*y*).

To baron *and* feme, and the heirs of the body *of the baron*, is an eſtate tail, *executed ſub modo* (*z*).

So to baron *and* feme for their lives, with remainder to the heirs of *their* bodies; the eſtate-tail *is executed*, and the heirs are [164]
in BY DESCENT (*a*).

5thly, Determinable or abſolute.

Nor is it of conſequence whether the eſtate to the anceſtor be ſuch as may poſſibly determine in the lifetime of ſuch anceſtor or not.

(*y*) 1 *Fearne*, 41. 43. 81. (4th edit.) and ſee the caſe of Webb *v.* Webb. 2 *Vern.* 668.

(*z*) 1 *Fearne*, 24. 26. (3d edit.) and 34. 38. 41. (4d edit.) and *poſt*. p. 166. See *Dyer*, 9. *pl.* 22. *Hale on F. N. B.* 142. B. N. (b). cites 28 *Ed.* III. f. 93.

(*a*) See the caſe of Roe *v.* Aiſtrop, 2 *Blackſt. Rep.* 1228.; and *Fearne*, 28. 46. (3d edit.) and vol. i. p. 40. 81. (4th edit.)

As to a widow during widowhood, or to baron and feme during their joint lives, remainder to the heirs of the body of the widow or feme; though ſhe could not have had an heir of her body before her death, yet ſhe might have married in the firſt caſe, or the huſband might have died in the other, before that event; yet the eſtate-tail was executed (*b*).

6thly, By implication.

Nor whether the eſtate of the anceſtor be expreſsly given, or ariſe by implication of law.

As if A. ſeiſed in fee, covenant to ſtand ſeiſed to the uſe of his heirs male by his ſecond wife; A. takes an eſtate for his own life by implication, and the eſtate-tail is executed in him (*c*).

But

(*b*) *Bro. Eſt.* 76. *Dyer*, 9. *pl.* 22. *Fearne*, 24. (3d edit.) vol. I. p. 34. (4th edit.)

(*c*) 1 *Vent.* 372. Pybus and Mitford; and *Fearne*, 30. (3d edit.) 49. (4th edit.)

Note; though the caſe of Pybus *v.* Mitford has been queſtioned, and even denied to be law, (ſee 7 *Vin.* 597.

5 Deſcent

But here we muſt obſerve, that when a [165] limitation is *expreſsly* made of the *freehold* during the anceſtor's life, ſuch expreſs eſtate rebuts an implication.

As where A. conveyed lands to truſtees and their heirs, in truſt, during his life, to permit him to receive the profits; remainder to the firſt and every other ſon of his then-intended marriage, in tail-male: and, for want of ſuch iſſue, to the heirs of his body generally; with remainder to himſelf in fee. The expreſs eſtate to the truſtees, during his life, precluded an *implied* one in A.; and, therefore, it was

Deſcent (I). *pl.* 38. in marg.); yet the doctrine as laid down in the rule is correct. And though what is ſaid in the caſe of Southcott *v.* Stowell, (2 *Mod.* 211. and 2 *Vern.* 735.) may be thought to invalidate the *inſtance* given, yet the *rule* ſtands unimpeached; there being *other* caſes directly in ſupport of the doctrine. See Penhay *v.* Hurrell, 2 *Vern.* 370. Wills *v.* Palmer, 2 J. *Bl. Rep.* 687. and 5 *Burr.* 2615. 1 *Atk.* 596. *Fearne*, 17. 30. 32, &c. (3d ed.); and 27. 50. 54, &c. (4th ed.) See 22 *Vin.* 283. Uſes, (A. b.) *pl.* 2. *in marg.*

 adjudged

adjudged that the heirs of his body were *in by purchaſe*(*d*).

But if the limitations of the freehold be ſuch as may determine during the life of the grantor, and *no expreſs eſtate* be limited to him, the uſe will reſult to him for life in remainder expectant upon ſuch precedent uſes, and his heirs ſhall be in *by deſcent*(*e*).

Though the determination, within the lifetime of the grantor, of any eſtate limited to others ſhall not, it ſeems, be preſumed, if ſuch determination muſt be effected by their *wrongful* act; as by the forfeiture or ſurrender of truſtees(*f*).

But, if the freehold be paſſed to truſtees and their heirs, and then any limita-

(*d*) *Carth.* 272. Tippin *v.* Coſin. ; and *Fearne*, 32. (3d. ed.) and 52. (4th ed.)

(*e*) See 2 J. *Bl. Rep.* 687.; and 5 *Burr.* 2615. Wills *v.* Palmer; and 1 *Fearne*, 54, &c.

(*f*) *Carth.* 272. Tippin *v.* Coſin.

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tion be made, though only for years, to the grantor, which muſt take effect by tranſmutation of poſſeſsion out of the ſeiſin of the truſtees, ſuch expreſs limitation to the grantor ſhall *prevent* his taking an eſtate for life by implication (*g*).

If the uſe limited to others than the grantor, be limited only *for years*, and *no uſe of the freehold be limited till the grantor's death*, the uſe of the freehold, as undiſpoſed of till that period, ſeems to fall within the doctrine of reſulting uſes; and ſo the anceſtor have an eſtate by implication to which the limitations to his heirs may attach (*h*).

And it ſeems that an eſtate may ſo reſult, or ariſe by implication, in the caſe of a truſt, as well as of a legal eſtate (*i*).

(*g*) See 2 *Lord Raym.* 854. Adams *v.* Terre-tenants of Savage. 1 *Fearne*, 50.

(*h*) See *Fearne*, 31. (3d ed.) 49, 50. 61. (4th ed.)

(*i*) See 1 *Atk.* 596—7. in the caſe of Hopkins *al.* Dare *v.* Hopkins.

 But

But it is ſaid that implication ſhall not be permitted in *a ſurrender* of copyholds, though it may be in *a will* of them (*k*).

7thly, Mediate or immediate.

Nor is it of moment whether the eſtates to the anceſtor and the heirs be mediate or immediate. (See the rule in Shelly's caſe, before.)

As to A. for life, remainder to the heirs of his body; or to A. for life, remainder to B. for life, remainder to C. in tail-male;
[166] remainder in tail general; remainder to the right heirs of A. (*l*).

8thly, Veſting or not veſting.

Nor whether the eſtate to the heir be ſuch as muſt neceſſarily, or may poſſibly, VEST *in*

(*k*) See 1 *Brownl.* 127. Allen & Naſh. *Cro. Car.* 366. Seagood & Hone. 1 *Fearne*, 200. (3d ed.) 416. (4th ed.) 1 *Watk. Copyh.* 115.

(*l*) *Trin.* 11 *Hen.* IV. *fol.* 74. b. *pl.* 14. *Fitz. Abr. Feoffmente*, *pl.* 109. *Co. Litt.* 22. b. 319. b. *Jenk. Cent.* 248. *pl.* 38. See 2 *Atk.* 57. Godolphin *v.* Abingdon; and 247. Colſon *v.* Colſon. And *Douglas*, 506. note; and *Fearne*, 21. 25. (3d edit.) and p. 30. 102. (4th edit.)

the

the anceſtor or not: for though there be an utter impoſsibility of its ever ſo veſting at all, yet if it ATTACHES *in him as a contingent remainder, the heir ſhall be in* BY DESCENT. Attaching.

As to A. and B. during joint lives; or to huſband for life, remainder to wife for life; remainder to the heirs general or ſpecial of *the one dying firſt*, or of *the ſurvivor*: though the limitation over is only a contingent remainder, yet it attaches in the anceſtor, and the heir ſhall be in BY DESCENT (*m*).

But this rule applies only to thoſe caſes in which the eſtate to the heir is limited BY WAY OF REMAINDER, *and does not extend to thoſe in which the eſtate to the heir is* A CONDITIONAL LIMITATION (*n*).

For, as the particular eſtate and the remainders over are but ſo many *portions*

(*m*) *Co. Litt.* 387. b. 1 *Brown's Chanc. Caſes*, 584. Appendix, Highway & *al. v.* Banner & *al.*; and ſee 1 *Fearne*, 32. 38. 133. 521. (4th edit.) and *Co. Litt.* 191. a. note (1). (Harg. and But. ed.) and *Ibid.* 26. a. *Preſton on Shelly's caſe*, 65.

(*n*) 1 *Fearne*, 414. 416.

of *the ſame* eſtate, they ſhall, when they attach in the ſame perſon, as before noticed, be ſo united as to cauſe the heirs to be in *by deſcent*.

But the nature of *a conditional limitation* is eſſentially different from this. The conditional limitation is *not* a *portion* of the eſtate firſt created, but *a new one* to take place on a ſpecified contingency on which the prior one is utterly to ceaſe; theſe, therefore, are incapable of coaleſcing, ſince they cannot exiſt together.

A remainder is to commence when the particular eſtate is, from its very nature, to determine; it is, as it were, a continuance of *the ſame* eſtate: it is a *part* of the *ſame whole*. A conditional limitation is *not* the continuance of the eſtate firſt limited, but is entirely a different and ſeparate one: it is not to commence on *the determination* of the firſt, but the firſt is to determine when the latter commences: it is the commencement of the latter which reſcinds and deſtroys the former; and not the ceaſing of the former which gives

gives exiſtence to the laſt. The particular eſtate and remainders are, in fact, (as the very terms imply,) but *one* and *the ſame* eſtate. The eſtate firſt appointed and the conditional limitation are ſeparate and diſtinct eſtates(*o*).

As to EXECUTORY DEVISES, they may be divided into two claſſes. The firſt conſiſts of thoſe caſes in which there has been a prior diſpoſition of the *whole fee*; and the ſecond, of thoſe in which there has been *no* prior limitation made of the eſtate.

The firſt claſs falls immediately within the obſervations we have made with reſpect to conditional limitations. And as to the ſecond, the very nature of the limitations it embraces is that there be *no particular eſtate* to ſupport them; for if there *be* a particular eſtate, they are *not executory deviſes* but *remainders*(*p*): as if a limitation

(*o*) See 1 *Fearne*, 9, &c. 414. 416. *Sand. on Uſes.* 182, &c.

(*p*) See *ante*, 134. N. (a).

tion be to the *unborn ſon of A.*: in theſe caſes, there being no particular eſtate, there can, of neceſsity, be none with which the executory limitation can unite.

Eſtate to the heir fixed in the anceſtor.

But as to *a remainder*, we may here remark, once for all, that *whenever an anceſtor takes the requiſite particular eſtate, the ſubſequent limitation to his heirs general or ſpecial is by the law* FIXED IN SUCH ANCESTOR; and if the ſubſequent limitation to the heirs be *unconditional*, it then *veſts* [167] in ſuch anceſtor; and if *immediate* alſo, (as to A. for life, with remainder to the heirs of his body,) it then is EXECUTED in him IN POSSESSION: if it be *mediate*, (as to A. for life, remainder to B. for life, remainder to the heirs of the body of A.) the ſubſequent limitation to the heirs is *a remainder* VESTED IN THE ANCESTOR, SUB MODO, *but not to be executed in him* IN POSSESSION *till the determination of the meſne eſtate.* But if the ſubſequent limitation be *contingent*, (as to the heirs of the anceſtor dying firſt,) then it *attaches* in the anceſtor as a contingent remainder: And if ſuch contingency happen in the lifetime of

of the anceſtor, it then becomes veſted in him: and, conſequently, in all theſe caſes the heirs ſhall take BY DESCENT(*q*).

And what has been ſaid applies as well TO COPYHOLDS *as to freeholds*(*r*). 9thly, Copyholds.

So alſo as well to LEGAL *eſtates* BY DEVISE *as by deed*(*ſ*). 10thly, Legal eſtates by deviſe.

So alſo as to truſts *executed*, or completely declared, and ſo as to take effect immediately under the deed or will originally creating the truſt; with reſpect 11thly, Truſts.

(*q*) See *Fitzh. Feoffment, pl.* 109. *Reliefe*, 4. *Bro. Done.* 11. *Eſtates*, 6. *Reliefe*, 2. See *Kitch.* 146. a. *Co. Litt.* 319. b. 345. a. 1 *Harg. Law Tracts*, 497. 499, 500. 503.; and 1 *Fearne*, 37—8. and 104. 108. (4th edit.)

(*r*) See 1 *Strange*, 487. Smith *v.* Triggs; and *Fearne*, 43. 49. (3d edit.) 79. 88. (4th edit.)

(*ſ*) *Fearne*, 57. (3d edit.) 96. (4th edit.) And ſee 3 *Atk.* 294. Warrick *v.* Warrick; 1 *Harg. Law Tracts*, 502.; and 3 *Pr. Wms.* 259. Atkinſon *v.* Hutchinſon.

to

to which, the ſame conſtruction prevails as in the caſes of legal eſtates (*t*).

But as to truſts *executory*, or to be carried into execution by ſome future act, as thoſe in which the limitations are imperfect and ſomething is left to be done by the truſtees in the firſt place, and, ſecondarily, by a court of equity; they are molded by the court as beſt to anſwer the intent of the perſon creating them (*u*). (Though, where it does not violate ſuch intent, the ſame rule is applied even to truſts executory as to legal eſtates (*x*)—).

[168] Words of purchaſe. And, therefore, the words "heirs of the body" are frequently taken as WORDS OF PURCHASE,

(*t*) See *Ca. Temp. Talb.* 19. Lord Glenorchy *v.* Boſville. 1 *Fearne*, 171. 190, &c. 2 *Veſ.* 655. Garth *v.* Baldwin.

(*u*) *Ca. Temp. Talb.* 19. 1 *Fearne*, 167, &c. 190. 201. 205. 217, &c. 1 *Atk.* 608. Roberts *v.* Dixwell; and ſee Bagſhaw & Spenſer in *Collect. Jurid.* 412.

(*x*) 2 *Veſ.* 655. Garth *v.* Baldwin. 1 *Fearne*, 184. 204, &c.

PURCHASE, if applied to trufts, when they would not be fo if applied to legal eftates; and when fo taken, are generally conftrued to the firft and other fons, &c. in ftrict fettlement (*y*). Strict fettlement.

Thus,

(*y*) This conftruction is chiefly applicable in the cafes of marriage articles.

For as, in marriage articles, a provifion for the iffue appears to have been the chief end in view, a court of equity will often confider them as purchafers, (1 *Pr. Wms.* 145. Bale & Coleman; and 291, Seale & Seale,) and decree a ftrict fettlement in the children; in order to prevent one of the parents only from fruftrating that intent, by deftroying the entail which might otherwife have taken place in the parent according to its legal conftruction.

And, therefore, where there is no danger of fuch end being fo defeated, a court of equity will *not* interfere, but fuffer the words to have their legal operation, and the entail to remain in the parent; as where the wife is made tenant in tail of lands moving from the hufband. 2 *Vef.* 358. Howell *v.* Howell. 2 *Atk.* 477. in the cafe of Green *v.* Eakins & *al.* 1 *Fearne*, 131, &c. 162, &c. 2 *Pr. Wms.* 356, note.

But it feems that this rule will not hold as to copyholds; the ftat. 11 *Hen.* 7. *c.* 20. not extending to them. See 2 *Cruife*, 158. 2 *Vef.* 358. note.

For

Thus, when a particular eſtate of freehold is in the anceſtor, the ſubſequent limitation

For where the power of altering ſuch truſts has been veſted in *both* parents, the court has refuſed to interfere. 2 *Veſ.* 358. Whateley *v.* Kemp. (cited) 1 *Fearne*, 132, &c.

So where a ſtrict ſettlement appeared to have been manifeſtly contrary to the intent of the parties. 2 *Veſ.* 358—9. 1 *Fearne*, 135, &c.

Nor will the court interfere where a ſettlement has been made by the parties *ſubſequently to the articles*, but *before* the marriage: for the ſettlement will, in ſuch caſe, be conſidered as a new agreement, and ſo controul them. *Ca. Temp. Talb.* 20. Legg *v.* Goldwire. 1 *Fearne*, 154. 2 *Pr. Wms.* 356, note.

Unleſs ſuch ſettlement be expreſsly alleged to have been made *in purſuance or performance of the articles*; ſo that the preſumption of a new agreement be done away. 1 *Pr. Wms.* 123. Honor *v.* Honor. 2 *Ibid.* 349. Weſt *v.* Eriſſey; and 356, note. *Ca. Temp. Talb.* 20. Legg *v.* Goldwire. 1 *Fearne*, 138, &c.

But where the ſettlement is made *after* marriage, the court will ſet up the articles againſt the ſettlement. 3 *Atk.* 371. Hart *v.* Middlehurſt. *Ca. Temp. Talb.* 20. Legg *v.* Goldwire. *Ibid.* 176. Streatfield *v.* Streatfield. 2 *Atk.* 39. Glanville *v.* Payne.

Yet where other property of a parent is limited to any of the iſſue, and the iſſue ſo provided for bring a bill for carrying the articles into ſtrict ſettlement, the perſon ſo bringing the bill ſhall, in many caſes, be put to

mitation to his heirs general or ſpecial ſhall be fixed in ſuch anceſtor, and the heirs

to election before the court will decree the execution of them. *Ca. Temp. Talb.* 176. Streatfield *v.* Streatfield. See 2 *Atk.* 39. Glanville *v.* Payne.

But if there were no articles entered into previouſly to marriage, there can, of neceſſity, be none to controul a ſettlement made afterwards; and where there are not articles as well as a ſettlement, the court will not conſtrue words which make a legal eſtate-tail in the parent, to the firſt and other ſons, &c. 3 *Atk.* 294. Warwick *v.* Warwick. 2 *Atk.* 39. Glanville *v.* Payne.

Unleſs, indeed, there is a direct declaration in the recital of the ſettlement that it was the intention of the parties to make a proviſion for the iſſue, by ſecuring the premiſes ſettled, for their benefit, in which caſe the court will effectuate ſuch intention by decreeing a ſtrict ſettlement, if the words of the deed would otherwiſe give an eſtate-tail to the parent, and enable ſuch parent, at law, to defeat the proviſion for the iſſue, contrary to the recited intention. But where the recital to aſſure the lands is in general terms, or, expreſsly, to ſettle them "*to the uſes thereinafter mentioned,*" a court of equity will not interfere, but ſuffer the words to have their legal effect. See 3 *Brown's Chanc. Ca.* 27. Doran *v.* Roſs. 1 *Veſ. Jun.* 57. S. C. and 170.; and ſee 2 *Veſ.* 351. Howell *v.* Howell; and *Cowper*, 12. Moore *v.* Magrath.

And

12thly, Ultimate limitation to the heirs of the grantor.

heirs in BY DESCENT; and so also *when the ultimate limitation is to the heirs general*

And note; that, in case of articles, it is not enough that they be recited; they must also be produced. *Ambler*, 515. Cardwell *v.* Mackerill; and 1 *Fearne*, 159.

Nor will a strict settlement be decreed in favour of *collaterals*, unless it should be apparent, from the circumstances of the case, that they were included in the considerations; for the intention of such articles seems *primâ facie* to be only to provide for *the issue of the marriage:* or unless the articles be decreed as to the persons first claiming; in which case the court will decree in *their* favour also; as it always executes articles *in toto*, or not at all. See 10 *Mod.* 533. Osgoode *v.* Stroud. 2 *Pr. Wms.* 245. S. C. 2 *Ibid.* 594. Vernon *v.* Vernon. 1 *Vef.* 73. Stevens *v.* Trueman. 3 *Atk.* 186. Goring *v.* Nash.

But, as the chief view of the court is to secure a provision for the issue independantly of the parent, it will decree an execution in favour of the children of the party covenanting to convey, and for whom that parent was morally obligated to provide, although such children be not the issue of the very marriage in consideration of which the articles were entered into; as those of a former, or of a future, marriage: or where a father covenants to settle lands on the marriage of his son, with remainder over to a daughter and the heirs of her body, it will carry the articles into execution in favour of the issue of the daughter; since the father

was

neral(z) of the grantor or devisor, or any undisposed of portion of the estate continue in him, his heirs shall succeed thereto BY DESCENT, *though* THE ANCESTOR HIMSELF TAKE *no* PARTICULAR ESTATE. For such ultimate limitation will still be in him *as a reversion(a).* [169]

was morally obliged to provide for her also. See the cases last cited; and, particularly, Goring & Nash. 1 *Ves.* 216. and 1 *Atk.* 265. Newstead & *al.* *v.* Searles & *al.* *Cowper*, 710. Doe *d.* Watson *v.* Routledge.

In cases of wills, where the claimants are merely volunteers, the court will not aid. See 1 *Fearne*, 163, &c. See also 2 *Pr. Wms.* 684. N. (1). Barnard *v.* Large, (cited).

Nor will equity decree a strict settlement, even in the case of articles, against purchasers for a valuable consideration and without notice. 3 *Atk.* 291. Warwick *v.* Warwick. 1 *Fearne*, 156, &c.

But a settlement, though made after marriage, by a person not indebted at the time, will be good against *subsequent* creditors. 1 *Atk.* 15. Russell & *al.* *v.* Hammond & *al.* *Ibid.* 265. Newsted *v.* Searles. 2 *Ves.* 11. Lord Townshend *v.* Windham. 2 *Brown's Chanc. Ca.* 90. Stephens *v.* Olive. *Cowper*, 705. Doe *d.* Watson *v.* Routledge.

(z) See *post*, 179. of a deed, &c.

(a) See 1 *Fearne*, 66. (4th edit.).

And as to this, the rule is, that

Portion undiſpoſed of is part of the old eſtate.

Whatever portion of the eſtate(b), *or uſe*(c), *or truſt*(d), IS NOT DISPOSED OF, *remains in the perſon who diſpoſes; and will* DESCEND *to his right heirs: for being part of the* OLD ESTATE, *it ſhall continue to go as if no diſpoſition at all had been made of it;* i. e. *if it had deſcended from the mother, to the heirs of the part of the mother, and* vice verſa.

And this although a particular eſtate or ſum be expreſsly given or limited to the heir at law: as if lands are deviſed to truſtees to ſell, and, out of the ſale-money,

(b) 3 *Pr. Wms.* 63. Cheſter *v.* Cheſter. *Ca. Temp. Talb.* 44. Hopkins *v.* Hopkins. 1 *Atk.* 581. S. C. *Butl.* N. (1). to *Co. Litt.* 271. b. S. C. *Preced. Chanc.* 542. Emblyn *v.* Freeman.

(c) *Co. Litt.* 23. a. 271. b. and N. (1).

(d) 3 *Pr. Wms.* 21. Cruſe *v.* Barley, and N. (1) 2 *Vern.* 644. Hobart *v.* Counteſs of Suffolk. *Ca. Temp. Talb.* 165. Robinſon *v.* Comyns; and 254—8. Manſell *v.* Manſell. 2 *Atk.* 150. Lloyd *v.* Spiller. 1 *Veſ.* 108. Arnold *v.* Chapman; Hopkins *v.* Hopins; and Emblyn *v.* Freeman; *ubi ſup.*

to

to pay one hundred pounds to the heir at law, yet he ſhall have the undiſpoſed-of ſurplus alſo. So, if an eſtate for life be deviſed to the heir, he ſhall have the reverſion too(*e*). But if no further diſpoſition be made than to the heir for his life, the fee deſcending ſhall merge the life eſtate(*f*).

As if a perſon, ſeiſed *ex parte materna*, deviſe or grant in tail, the reverſion will remain in him, and ſhall deſcend to his maternal heirs(*g*).

So if he, after ſeveral meſne eſtates, limit the ultimate "remainder" to his own right heirs; for it is not a remainder, though it be called ſuch, but the reverſion, which ſhall deſcend as before (*h*).

And

(*e*) *Preced. Chanc.* 162. Randall *v.* Bookey. 1 *Pr. Wms.* 390. Starkey *v.* Brooks.

(*f*) See 3 *Leon.* 26. *Ca.* 53. *Cro. Jac.* 260. Wood *v.* Ingerſole.

(*g*) See 2 *Inſt.* 335. *Litt.* ſ. 19.; and *Co. Litt.* 22. b. and 2 *Bla. Comm.* ch. 7. p. 112.

(*h*) See *Jenk. Cent.* 248. *pl.* 38. *Bro. Livery, & Ouſt le Main.* 61. *Ten.* 21.; and 2 *Atk.* 57. Godolphin

And this although ſuch ultimate limitation be *proviſionally* made: as if the anceſtor covenant to ſtand ſeized, or make a feoffment, to the uſe of his wife for life, with ſuch ultimate limitation to his own right heirs; with a proviſo that if the wife be diſturbed by the heir, or any claiming under him, then to the uſe of the wife and her heirs. For ſuch limitation to his own heirs is void as a remainder; being part of the old eſtate, to which the heir ſhall ſucceed by deſcent (*i*).

[170] And note; that where the ultimate limitation of the wife's eſtate was to the right heirs of the wife, with a proviſo for the wife to diſpoſe of it "as ſhe ſhould think fit," it was held to be only *a new qualification of* THE OLD ESTATE, *and not*

phin *v.* Abingdon. 2 *Co.* 91. b. Bingham's caſe; and caſes there cited.

So of copyholds; ſee 1 *Watk. Copyh.* 95.

(*i*) See *Moore*, 742. *pl.* 1022. Barton's caſe; and ſee *Dyer*, 124. *pl.* 38. *Cro. Eliz.* 919. Haynſworth *v.* Pretty.

an

an alteration of it till ſuch new qualification ſhould be executed(*k*).

"Heir" in the ſingular number.

But if an eſtate be to A. for life, with remainder to "the next heir male" of A. in the SINGULAR number, and WORDS OF LIMITATION BE GRAFTED THEREON, ſuch heir ſhall take BY PURCHASE: the words "next heir male" being only expreſsive of the perſon who ſhould take, or as a *deſcriptio perſonæ*(*l*).

And we may obſerve, on this point, that, when an eſtate for life is limited to a perſon, and another is limited over to his heirs, or iſſue, if it ſhould appear that by the words heirs or iſſue was meaned a cer-

(*k*) Abbot *v.* Burton, 11 *Mod.* 181.; and in 14 *Vin.* Heir, (W. 2.) *pl.* 6. p. 289.

(*l*) See Archer's caſe, 1 *Co.* 66.; and ſee further, *Fearne*, 102. 294. (3d edit.) and 229. 548. (vol. i. 4th edit.) *Powell on Deviſes*, 363. *Godbolt*, 155. *pl.* 207. *Robinſ. on Gavelk.* b. 1. c. 6. p. 95—7. 2 *Strange*, 731. Goodright *d.* Liſle *v.* Pullin & *al.*; and ſee *Harg.* note (4) to *Co. Litt.* 8. b. and authors there referred to; and 1 *Harg. Law Tracts*, 505—7.; and 2 *Burr.* 1110. Doe *d.* Long *v.* Laming.

tain or particular *perſon*, with relation to the time when ſuch limitation ſhould take place, (as the death of the tenant for life,) then ſuch words ſhall be *words of purchaſe*; but if the teſtator intended to comprehend, by ſuch words, *a claſs* or *denomination of heirs*, and intended to embrace them *indefinitely*, then they ſhall be *words of limitation* (m).

Reſulting uſe.

So alſo if the entire uſe reſults; he being then in of his *ancient* uſe.

[171] For the uſe follows the nature of the land from which it ſprings; "as the ſhadow follows the body."

And, therefore, if a perſon, ſeized of land as heir on the part of his mother, make a feoffment, or levy a fine, *ſur cognizance de droit come ceo, &c. without* declaring the uſes to which it ſhall enure,

(*m*) See *Harg. Law Tracts*, 561. 1 *Bro. Ch. Caſ.* 206. Jones *v.* Morgan.

the uſe reſults; and the heirs on the part of the mother ſhall ſucceed (*n*).

So the reſulting uſe of gavelkind-lands ſhall deſcend to all the ſons; and of lands in Borough-Engliſh to the youngeſt (*o*).

So a reſulting uſe of copyholds ſhall follow the cuſtomary deſcent (*p*).

So alſo of a truſt (*q*).

And, as the uſe ſhall follow the deſcent, ſo ſhall it reſult alſo according to the *quantity of the eſtate* which the grantor or grantors had before in the lands: as if there are two joint-tenants for life, with

(*n*) *Co. Litt.* 12. b. N. (2). 13. a. N. (2). 2 *Co.* 58. a. Beckwith's caſe; and *poſt*, 181. 185—7.

(*o*) See *Robinſ. Gavelk.* 78—9. b. 1. ch. 5. and authors by him cited. *Bro. Feoffm. al. Uſes*, 32.; and ſee 2 *Veſ.* 300. Fawcett *v.* Lowther.

(*p*) See Fawcett *v.* Lowther, *ubi ſup.* See 22 *Vin. Uſes*, (Y. a.) *pl.* 6. 1 *Watk. Copyh.* 215.

(*q*) Fawcett *v.* Lowther; and 22 *Vin. Uſes*, (D). *pl.* 7. *Watk. Copyh. ubi ſup.*

the remainder over in fee to one of them, the ufe fhall fo refult; and they fhall continue *in* in the fame manner. So of tenant for life and reverfioner (*r*).

Truft.

So if the ultimate limitation OF A TRUST *be to the right heirs of the perfon creating it, fuch heirs take* BY DESCENT, *while fuch truft continues:* for trufts are fubject to the fame rules, as to defcents, as legal eftates (*f*). But if fuch heir gain the *legal* eftate by defcent or purchafe, fuch truft eftate becomes extinct (*t*).

Incidents follow the reverfion.

And as the ultimate limitation (or reverfion) of an eftate fhall thus defcend to the heirs of the part of that parent from whom it

(*r*) 2 *Co.* 58. a. Beckwith's Cafe. 1 *Co.* 126. b. Chudleigh's cafe.

(*f*) 2 *Pr. Wms.* 713. Banks *v.* Sutton. 736. Cowper *v.* Earl Cowper. 2 *Bla. Comm.* ch. 20. p. 337.; and fee 1 *Atk.* 596. Hopkins *v.* Hopkins. 2 *Atk.* 57. Godolphin *v.* Abingdon. *Ca. Temp. Talb.* 3. Lord Glenorchy *v.* Bofville.

(*t*) See the cafe of Doe *on dem. of* Balch *v.* Putt, *in Dougl.* 771. and *poft.* 181, &c.

came,

came, ſo ſhall ITS INCIDENTS: as, from the very nature of the thing, the incident ſhall follow, and be ruled by, its principal.

And, therefore, if A. ſeized in fee *ex parte materna* makes a gift for life, or in tail, reſerving *rent*, and dies without iſſue, the rent ſhall go to his heir on the part of his mother (*u*). Rent.

So if he had had a rent-ſeck, and *a diſtreſs* was afterwards granted to him and his heirs, the diſtreſs ſhould go with the rent, as an incident to it, to his heirs *ex parte materna* (*x*). [172] Diſtreſs.

So if he has a houſe *ex parte materna*, and one grant to him that he and his heirs ſhall have competent *eſtovers* to be burned in ſuch houſe; theſe, though a new purchaſe, ſhall go with the houſe, as appur- Eſtovers.

(*u*) *Co. Litt.* 12. b. and *poſt.*

(*x*) 8 *Co.* 54. a.; and *Co. Litt.* 12. b.

tenant

tenant to it, to his heirs of the part of his mother (*y*).

Condition. But *a condition*, it is ſaid, ſhall *not* go to the heirs of the part of the mother, for it is not an incident: and, therefore, if ſuch eſtate had been granted on condition, the heir *ex parte* PATERNA ſhould have taken advantage of it; but the heir *ex parte* MATERNA might have entered on him, and enjoyed the eſtate (*z*).

[173] Thus, ſo long as the eſtate which is derived *ex parte materna* CONTINUES, ſo long ſhall it DESCEND *to the maternal heirs*; but if ſuch eſtate be made to fix BY PURCHASE in him who is heir *ex parte materna*, the eſtate ſo fixed ſhall deſcend to HIS heirs *on the part* OF HIS FATHER, as before aſſerted.

(*y*) 8 *Co.* 54. a.

(*z*) *Co. Litt.* 12. b. *Plowd.* 57. a. (where *Montague*. C. J. calls this "a cunning caſe.")

But indeed the doctrine ſeems juſtly queſtionable. See *Robinſ. on Gavelk.* b. 1. c. 6. p. 121, and note.

We

We will now, therefore, proceed to enquire what act of the person, seized *ex parte materna*, will fix the estate so derived, in him or his heirs BY PURCHASE, and, consequently, change the descent to the paternal line?

What shall change the descent from the maternal to the paternal line.

And to effect this, he must acquire, or give, A NEW ESTATE: for if the person taking be *in*, in any wise, of the OLD ONE, he is *not* in AS A PURCHASER: and, therefore, its descent will *not* be changed.

New estate.

As if the heir enter for condition broken, he is *in* of *the* OLD *estate*, and, consequently, BY DESCENT (*a*).

Old estate.

(*a*) See *Jenk. Cent.* 249. *pl.* 40. *Co. Litt.* 12. b. 76. a. and 202. a. and b. 1 *Co.* 95. a. 99. a. *F. N. B.* 143. Q.

So of a copyholder who surrenders on condition; on its being broken, or fulfilled, (as the case may be,) he may enter, and shall be in *in statu quo prius*, without a new admission or fine. See *Co. Copyh.* s. 56. *Tracts*, p. 128. *Kitch. Courts*, 123. a. (Fr. edit.) *Calth.* 60.

We

[174] We will, therefore, consider the operation of his devise, his deed, his fine, and his recovery.

Devise.

And, first, as to A DEVISE.

And as to this, the law is, that

When it shall not alter the descent.

When a person devises such lands to his right heirs, WITHOUT CHANGING THE TENURE OR QUALITY OF THE LANDS, *although he charge them with debts or other incumbrances, yet the heir shall be in* BY DESCENT; *and the lands shall go, on his death without issue, to his heirs* ON THE PART OF HIS MOTHER(*b*): for descent is favoured in law.

(*b*) *Lord Raym.* 728. Emerson *v.* Inchbird. *Ibid.* 829. Reading *v.* Rawsterne, or Royston. *Comyns's Rep.* 123. Ca. 86. S. C. *Ibid.* 72. Ca. 45. Clarke *v.* Smith. 2 *Stra.* 1270. Allen *v.* Heber. 1 *Blackst. Rep.* 22. S. C. 2 *Atk.* 290. Plunkett *v.* Penson. 2 *Burr.* 879. Hurst & *al. v.* Earl of Winchelsea & *al.* 2 *Bl. Comm.* 241—2. ch. 15. *Co. Litt.* 12. b. N. (2). *Dyer*, 124. *pl.* 38. 3 *Leon.* 26.; and see further, *Com. Dig.* Devise, (K). and *Viner*, Devise, (P. c.)

And

And it is the ſame as to COPYHOLDS, notwithſtanding they paſs by ſurrender; for ſuch ſurrender, and the conſequent admiſsion, will *not* make a *new* eſtate (*c*). [175]

And the old caſes, (1 *Cro.* 161.) that if a man deviſe to his heirs in fee upon condition, the heir ſhall take by purchaſe; and the opinion in 2 *Mod.* that if a man deviſe to his heir, paying 20*l.* the heir ſhall take by the will, and not by deſcent; are (ſaid to be) unintelligible and ill-reported. *For if a man deviſe lands to his heir*, CHARGED WITH A RENT ISSUING OUT OF THEM, *the heir ſhall take* BY DESCENT (*d*).

And it is not in the election of the heir to be in by purchaſe or by deſcent; for the law caſts the deſcent on him immediately on the death of the anceſtor, and the

(*c*) See 1 *Strange*, 487. Smith *v.* Trigg; and *Fearne*, 49. (3d edit.) 87. (4th edit.)

(*d*) Clark and Smith, *Comyns's Rep.* 72. *ca.* 45.; and *Cro. Eliz.* 833. *pl.* 2. and 919, *pl.* 14. Haynſworth *v.* Pretty, *Acc.*

devise is absolutely void. Besides, could the heir, by his election, have taken by purchase, he would have defeated his lord of many emoluments of his seigniory, and deprived the specialty creditors of his an-
[176] cestors of the fund which was answerable for their demands: for till the statute of *Will.* 3. the devisee was not chargeable, and even that statute does not affect our present subject (*e*). Indeed, the cases on this point go apparently upon the supposition that the heir has *no* election; and consider the devise as absolutely void, as having "no operation at all," and not as being dependant upon the will of the heir (*f*).

(*e*) See 2 *Strange*. 1270. Allen *v.* Heber; and see also 1 *Lord Raym.* 728. Emerson *v.* Inchbird; and 2 *Burr.* 1106. Long *v.* Laming.

(*f*) See the cases of *Reading and Royston, and Allan* v. *Heber*, *ante* and *post.*; and *Hob.* 30. 1 *Freem.* 248. *pl.* 263. Brittane *v.* Charnock; and see *Powell on Dev.* 427. 430. 1 *Strange*, 491. Smith *v.* Triggs. 3 *Leon.* 118. Ca. 167. Bashpool's case. 4 *Leon.* 35. S. C. and see *Butl. Continuation of Harg.* N. (1). to *Co. Litt.* 64. a. (Sect. v. (3).—).

But

But if the devisor ALTER THE ESTATE, AND LIMIT IT DIFFERENTLY FROM WHAT IT WOULD HAVE DESCENDED TO THE HEIR, *the heir shall take, of course,* BY PURCHASE; *it being* ANOTHER ESTATE; *which must descend from such heir*, AS THE FIRST PURCHASER, *to his heirs on the part* OF HIS FATHER (*g*).

When it shall.

And, therefore, if a person seized in fee devise his lands to his eldest son IN TAIL, the son, though heir at law, shall take BY PURCHASE; for it is a *different* estate from that which would have descended to him (*h*). [177]

And if the devisor had been seized *ex parte materna*; or if a mother had so devised to her son; as the devisee would take such entail AS A PURCHASER, should he afterwards suffer a recovery the fee so ef-

(*g*) See the references in note (*b*), p. 174.

(*h*) *Trin.* 3 *Hen.* VI. *pl.* 1. *fol.* 46. a. *Plowd.* 545. b.; and see the case of Wills *v.* Palmer, 2 *Bla. Rep.* 687.; and 5 *Burr.* 2615.

fected

fected would defcend to his heirs *on the part* OF HIS FATHER (*i*).

So whenever a perfon, feized in fee, *devifes* an eftate to his heir at law and *limits a remainder over*, the heir fhall take by the devife and be in *by purchafe*(*k*). But if, on the other hand, he had devifed the particular eftate to a ftranger and the remainder over to the heir in fee, the heir fhould be in *by defcent*(*l*).

Note then, the difference when the heir takes a particular eftate and the ultimate limitation be to a ftranger, and when the particular eftate be to a ftranger and the ultimate limitation to the heir at law. The eftate taken by *defcent* muft be the old fee; but the ultimate limitation to a ftranger neceffarily prevents the prior one

(*i*) See *poft.* p. 187.; *and cafe of* Martin *v.* Strachan, 1 *Wilf.* 66.

(*k*) See *Bro. Devife.* 4. and 41.; and *ante*, Cafe of Wills and Palmer.

(*l*) *Ante*, p. 169. 174.

to

to the heir from being a fee; and, consequently, *that* so taken by the heir must be a *different* one from that which was in the anceftor. Whereas, if the *ultimate limitation* be to the heir at law, it muft be part of the old fee, undifpofed of; the devife being void; as conveying the fame eftate (in point of *quality*) as that which would have defcended to him, and which was once in the anceftor (*m*).

So, in the cafe of an *executory devife*; the heir at law fhall take the eftate *by defcent* until the contingency arife; for *until* that event, *the fee* is not affected; and, confequently, *the fame eftate* which was in the anceftor devolves to the heir (*n*).

So if a perfon has feveral daughters, who would be his heirs at law, and devife to them in fee, they fhall take AS PURCHASERS. For though they would have fucceeded to him as his heir, yet that

(*m*) *Ante*, p. 175—6.

(*n*) *Ante*, p. 134.; and *poft*. 179.

would be *in parcenary*; whereas here they take *in joint-tenancy* or *common* (*o*).

So where A. having two daughters, (one of whom died, leaving a ſon,) deviſed his
[178] land to the ſon of his deceaſed daughter; the ſon took AS A PURCHASER. For, "by this deviſe there was an alteration of the eſtate; for if the land had *deſcended*, both the daughters would be but one heir, and would take as coparceners: but when a deviſe is made of all to one, or the ſon of one, of the daughters, then the deviſee takes BY PURCHASE in *a different manner* from what would be, in caſe the land had deſcended (*p*)."

So if a perſon has ſeveral ſons, and, being ſeized of lands in gavelkind, deviſe to them; they would take BY PURCHASE,

(*o*) *Cro. Eliz.* 431. *pl.* 36.; and ſee *Godb.* 362, 363. *ca.* 455. Taylor & Hodgſkins; and *ante*, p. 150. note (*d*); and *poſt.* note (*q*). 3 *Atk.* 731. Rigden *v* Vallier.

(*p*) *Com. Rep.* 123. *ca.* 86.; and 2 *Lord Raym.* 129. Reading *v.* Royſton.

as joint-tenants, or as tenants in common(*q*)."

So if one ſeized of lands at common-law, deviſe them to his eldeſt ſon and a ſtranger, it is a good deviſe; and they ſhall take AS JOINT-TENANTS (*r*).

But if the teſtator deviſe to his ſon and a ſtranger, or to two or more of his ſons

(*q*) *Moore*, 864. *pl.* 1190. Sparke *v.* Purnell. See *Robinſ. on Gavelk.* b. 1. c. 6. p. 126—7. and authors there referred to; and ſee alſo 2 *Burr.* 1100. Long *v.* Laming; and 1 *Hen. Bla. Rep.* 1—5. E. 28 *Geo.* 3. Dally *v.* King; and ſee 3 *Atk.* 731. Rigden & *al. v.* Vallier.

(*r*) *Godb.* p. 94. *ca.* 105. and ſee 1 *Hen. Blackſt.* 1. Dally *v.* King.

So if a father had enfeoffed his ſon and heir and a ſtranger, with remainder to the heirs of the ſon; the ſon ſhould have taken *by purchaſe* for the benefit of the ſtranger; though, had it not been for the ſtranger, it would have been deemed a mere colluſion for the purpoſe of defrauding the lord of his worſhip. *Per Danby. Paſch.* 33 *Hen.* 6. *pl.* 6. *fol.* 15. b.

So a deviſe to A. for life, with remainder to the *right heirs of the teſtator and of B.*; and B. die in the life-time of A. the heirs would take as joint-tenants. See 1 *Roll. Rep.* 317.

 (one

(one only being his heir) *in common*, it ſhould ſeem that the ſon being heir at law ſhall take his portion *by deſcent*.

For, as Mr. *Fearne* remarks (*ſ*), and I think very juſtly, if we ſuppoſe a teſtator to deviſe a moiety or any other ſhare of his real eſtate to a ſtranger, making no diſpoſition at all of the remaining undivided ſhare, ſuch remaining undivided ſhare would, of courſe, deſcend to his heir at law, and he muſt hold *in common* with the deviſee of the undivided ſhare deviſed. It is clear, therefore, he adds, that an heir may take *by deſcent*, as *tenant in common* with a deviſee, an undivided part of the eſtate, which his anceſtor was ſolely ſeized of: and it ſhould, therefore, ſeem to be immaterial, whether the ſhare he would ſo take be *expreſsly deviſed to him*, or left unnoticed by the *will*; for if expreſsly deviſed he would take it *in common*, and, if not noticed, he would take it *in the ſame manner*; and a deviſe to two as *tenants in common* is, in effect, a deviſe of

(*ſ*) *Poſth. Works*, 130—2.

of one undivided part *to one*, and of *another undivided part to the other*; ſo that under ſuch a deviſe to an heir and another, as *tenants in common*, the heir takes as if *one undivided moiety* were deviſed to *the other*, and the reſidue to himſelf; that is, in the ſame manner as if no diſpoſition at all of ſuch reſidue had been expreſſed in the will; in which caſe he would have taken by deſcent; and, therefore, the ſame eſtate been deviſed to him in ſuch reſidue as he would have taken by deſcent, the general rule, reſpecting deviſes to an heir, ſeems to extend to it.

"It has, indeed, been held (*t*), that a deviſe to *the heir and another*, makes the heir a purchaſer; but that ſeems, ſays Mr. *Fearne*, to be on account of the *joint-tenancy* and benefit of *ſurvivorſhip* to the ſtranger. And it appears that, under a deviſe to *two co-heirs* (*u*), they take as joint-tenants by the will, and not *by de-*

(*t*) *Ante*, (*p*). 178. (*r*).

(*u*) See *ante*, p. 177. (*o*). and 178. (*q*).

ſcent; and ſo in a deviſe to them *in common*, they take as *tenants in common*, and not *by deſcent*. But, it is evident, under either of theſe tenures, they take *every part* of the land deviſed in a different manner than *by deſcent*; whereas, in the caſe of a deviſe to the heir *and another*, as *tenants in common*, the heir ſeems to take *the part deviſed to him* juſt in the ſame manner as if it had been left *to deſcend* to him, and, conſequently, that no obſtacle would ariſe as to the eldeſt ſon's taking his *moiety by deſcent*; and, conſequently, if the teſtator had had the lands from his mother, that ſuch *moiety* would deſcend from the eldeſt ſon to his heir on the part of his paternal grandmother."

[179] So where one deviſed to his ſon and heir, "but in caſe he died without iſſue, not having attained twenty-one," *then over*: the ſon attained twenty-one. By HENLEY, *Lord-Keeper*, "the eldeſt ſon took BY DEVISE, as having, under the will, a different eſtate than would have deſcended to him: the one being pure and abſolute, the other not." And reference

 was

was made to the caſe of Allum *v.* Heber, *Lutw.* 797; and 1 *Salk.* 241 (*x*).

But in the caſe of Hinde *v.* Lyon (*y*), where a deviſe was "to the wife till the heir ſhould be of the age of twenty-four years, and that at that age the heir ſhould have the lands to himſelf and his heirs for ever; and that when he ſhould come to the age of twenty-four years, the wife ſhould have the third part during her life; and if the heir died before the age of twenty-four years, that then the lands ſhould remain to the wife during her life, with remainder, after her death, (if the heir had no iſſue,) to the daughter of the deviſor in tail, remainder to the right heirs of the deviſor;" it was adjudged that the heir, having attained twenty-four, was in *by deſcent*.

In this caſe, therefore, the heir was not to take till he attained twenty-four; but,

(*x*) *Ambler*, 383, Scott *v.* Scott.

(*y*) *Dyer*, 124. a. *pl.* 38. 2 *Leon.* 11. 3 *Ibid.* 64. 70.

ſo ſoon as he would have taken, he would have taken the *abſolute fee*, (*not* a *baſe-fee*, as in Scott *v.* Scott); and as he would have taken an abſolute fee under the will, it would have been the ſame eſtate as he would have taken without the will; and, conſequently, would be in by deſcent, as of the worthier title.

Deed. And as to A DEED, the law is, that

Fee-ſimple. *A perſon* CANNOT *raiſe* A FEE-SIMPLE *to his own right heirs, by the name of heirs,* AS A PURCHASE, *unleſs he parts with* THE WHOLE ESTATE (*z*).

Fee-tail. *Neither can he make* THE HEIRS OF HIS BODY *to take* BY PURCHASE, *by conveyance* AT COMMON-LAW (*a*):

(*z*) *Co. Litt.* 22. b. *Dyer*, 156. *pl.* 24. *Hob.* 30. 1 *Vent.* 372. 1 *Pr. Wms.* 359. 387. 2 *Atk.* 57. 2 *Bla. Rep.* 687—9.

(*a*) *Co. Litt.* 22. b. *Brooke*, *Done*, 32. and *Taile*, 11. *Dyer*, 156. *pl.* 24. 2 *Bla. Rep.* 687. and 1 *Fearne*, 67. (4th edit.)

As if he limit an eftate to A. for life, with remainder to the heirs of his own body; fuch remainder is void. [180]

Ufe.

But if it had been BY WAY OF USE, as to A. and his heirs, to the ufe of B. for life, with remainder to the ufe of *the heirs* OF THE BODY *of the donor*; the heirs of his body would take BY PURCHASE(*b*).

Heirs general.

Yet had the remainder been (or had there been a fubfequent remainder) to *his heirs* GENERAL, they would have taken BY DESCENT and been in of the OLD *eftate*(*c*).

(*b*) See *Carth.* 272—4. 1 *Fearne*, 67. and 118—119. (4th edit.)

But note, in order to make the heirs of the body of the grantor or donor to take by purchafe; the eftate muft be fo limited as to exclude the prefumption of an *implied* life-eftate in fuch grantor; as, otherwife, fuch limitation to the heirs of his body may fix in the anceftor, and fo the heirs be in by defcent. See *ante*, 164—5.; and the cafe of Wills *v.* Palmer in 2 *Bla. Rep.* 687.; and 5 *Burr.* 2615.; and 1 *Fearne*, 54, &c. (4th edit.)

(c) See *ante*, p. 169.

But

Parting with the whole estate.

But if the grantor part with HIS WHOLE ESTATE, and *then* a limitation be either to his heirs general or ſpecial, ſuch heirs ſhall take BY PURCHASE; for here the reaſon fails: the limitation cannot be conſidered as *the reverſion*, for that is always *a part of the eſtate granted which remains in the grantor*(*d*): but where THE WHOLE is granted, there is nothing which can remain in him; and, conſequently, there can be *no* reverſion; for if there *be* a rever-
[181] ſion left, he has *not* granted ALL. If, therefore, a perſon grants to A. and his heirs for ever, (in fee-ſimple,) he can have no reverſion left in him; and ſo any eſtate limited afterwards to him or his heirs muſt be *a* NEW *eſtate*, and taken BY PURCHASE.

Feoffment and re-enfeoffment.

As if A. ſeized *ex parte materna*, make a feoffment in fee, and take back an eſtate to him and his heirs; this is A NEW PURCHASE: and if he die without iſſue, his

(*d*) *Co. Litt.* 22. b.; 2 *Bla. Comm.* 175. ch. 11.

heirs

heirs *on the part of* HIS FATHER ſhall inherit(*e*).

"But this muſt be underſtood of *two* diſtinct conveyances in fee: the *firſt* paſsing *the uſe as well as the poſſeſsion* to the feoffee, and ſo completely diveſting the feoffor of *all* intereſt in the lands; and the *ſecond* regranting the eſtate to him." Uſe.

"For if in the firſt feoffment the uſe had been expreſsly limited to the feoffor and his heirs, or if there was no declaration of uſes and the feoffment was not on ſuch conſideration as to raiſe an uſe to the feoffee, and conſequently the uſe reſulted to the feoffor; in either caſe he is in of his [182]
ancient uſe, and NOT BY PURCHASE(*f*)."

(*e*) *Co. Litt.* 12. b.; and ſee *Brooke, Liv. & Ouſter le Maine, pl.* 61.

(*f*) *Hargrave's* note (2) to *Co. Litt.* 12. b.; and ſee *Co. Litt.* 13. a. and 22. b. *Serjeant Carthew's Readings on the Law of Uſes, in the Collect. Jurid.* vol. i. p. 370. 376—7.; and ſee alſo 2 *Co.* 58. a.; and *Brooke, Liv. & Ouſter le Maine,* 61.

But

But I conceive that, before the ſtatute of 27 *Hen.* VIII. *c.* 10., it was by no means requiſite that the uſe ſhould paſs to the feoffee on the feoffment, ſo the legal eſtate was deveſted out of the feoffor. For, though the uſe was not conveyed by the firſt feoffment to the feoffee, but reſulted or was expreſsly limited to the feoffor or his heirs, yet, that on the *re-enfeoffment* by the feoffee, the feoffor would have been in of a new eſtate, and ſo the line of deſcent have been changed (*g*).

For, although ſuch uſe ſo limited or reſulting to the feoffor, even before the ſtatute (*h*), would have been the *ancient uſe*, yet if the *legal eſtate* was afterwards conveyed to the *ceſtuy que uſe*, it would have, certainly, veſted in him *by purchaſe*, and have gone to his paternal heirs. For, though the *uſe* was the *old uſe*, the *legal*

(*g*) See *Carthew.* 141. Rice *v.* Langford; and ſee alſo *Hale's Comm. Law*, 269. ch. 11.; and 3 *Veſ. Jun.* 339. 342. Selby *v.* Alſton.

(*h*) See 1 *Co.* 100. b.

eſtate

eſtate would have been a *new one*; it having before paſſed entirely from the feoffor. And, on the re-conveyance to him, the old uſe would have been extinct: in the ſame manner as a conveyance of the legal eſtate by a truſtee would, at this day, veſt in the *ceſtuy que truſt* as a purchaſer, and extinguiſh his equitable intereſt; as we are about to notice.

Thus, if an eſtate, deſcended *ex parte materna*, be conveyed to A. and his heirs, to the uſe of him and his heirs, upon certain truſts; and the ultimate limitation of ſuch truſt be expreſsly made, or a portion be unlimited, and ſo reſult to the perſon conveying, or his heirs, ſuch truſt, ſo limited or reſulting, will be part of the old eſtate, and go to his heirs by deſcent (*i*).

(*i*) See *Bro. Feoffm. al. Uſes, pl.* 32. 22 *Vin.* 185. *Uſes*, (D). For truſts are ſubject to the ſame rules, as to deſcents, as legal eſtates: See 2 *Pr. Wms.* 713. Banks *v.* Sutton. *Ibid.* 736. Cowper *v.* Earl Cowper. 2 *Bl. Comm.* 337. ch. 20. See alſo *Rep. Temp. Talb.* 3. Lord Glenorchy *v.* Boſville. 1 *Atk.* 596. Hopkins *v.* Hopkins.

For

For though the grantor thus devests himself both of the legal estate and the use (*k*), yet the beneficial interest appertains (when not otherwise disposed of) to the person who would have been entitled to the legal estate if it had not been conveyed (*l*); in the same manner as the use would have done before the statute on the conveyance of the legal estate. And as a trust now is what a legal estate then was (*m*), it must follow that, as such use, whether expresly limited or resulting, was the ancient use, a thing collateral and annexed in privity to the estate of the land, and

(*k*) 1 *Atk.* 589. 591. Hopkins *v.* Hopkins; and *Ibid.* 622. Hawkins *v.* Chappel & *al.* *Rep. Temp. Talb.* 165. Robinson *v.* Comyns. *Carth.* 272. Tippen *v.* Cosin. *Comyns's Rep.* 242. Daw *v.* Newborough.

(*l*) See *ante*, p. 169, (*d*). and *Co. Litt.* 272. b. 2 *Ves.* 304. Fawcett *v.* Lowther. *Carthew.* 141. Rice *v.* Langford.

(*m*) 2 *Atk.* 150. Lloyd *v.* Spillet; and see *Co. Litt.* 172. b.; and *Butl.* note (2). to *Co. Litt.* 171. b. 1 *Atk.* 591. Hopkins *v.* Hopkins. 2 *Bla. Comm.* 336. ch. 20. *Carthew.* 141. Rice *v.* Langford.

to

to the perſon touching the land (*n*), and ſo, as it were, a portion of the *old eſtate*, ſuch truſt, ſo limited or reſulting, muſt be a portion of the old eſtate alſo.

But, if ſuch truſt eſtate deſcend *ex parte materna*, and the legal eſtate be afterwards conveyed to the *ceſtuy que truſt*, he ſhall take ſuch legal eſtate by purchaſe; and, conſequently, it ſhall go, on his death, to his heirs on the part of his father: and the truſt eſtate ſhall merge in the legal when they both become fixed in him.

As where a woman conveyed an eſtate to truſtees in truſt to permit her to receive the profits during life; and (after ſeveral meſne limitations of ſuch truſt) in truſt for her right heirs. The truſt deſcended: and afterwards one who was her heir, as [183]
to a moiety of the premiſes, had the legal eſtate conveyed to him by the truſtee: and it was held that the *legal* eſtate veſted in him BY PURCHASE, and that it ſhould

(*n*) *Co. Litt.* 272. b.

deſcend

descend to his heirs on the part of the father, and could not follow the old use (*o*).

For as to heirs *ex parte paterna vel materna*, it does not appear that an heir of one sort has been ever held, even in equity, to be as a trustee for an heir of the other; but, when the legal and trust estates concentre in the same person, the trust estate becomes absorbed in the legal (*p*).

And, upon the same principles, it should seem that if lands be *mortgaged in fee* and,

(*o*) *See the case of Doe on Dem. of* Balch. *v.* Putt, *or* Pott. *in Dougl.* 773, 774. 777.; and *post.* 191.

So, before the statute of uses, if a person enfeoffed another to the intent to pay his debts, and then to re-enfeoff his own heirs; upon such enfeoffment, the heir should not have been in ward; and, consequently, would have been in by purchase. See *Brooke*, *Garde.* 5.

Thus, whether we consider this to have been an use or trust, (See *Sanders on Uses*, 9. 14. 18.) yet we see that, on the re-conveyance of the legal estate to the heir, it vested in him *as a purchaser*.

(*p*) See *Dougl.* 779.; and *post.* 191. See also *Cas. Temp. Talb.* 164. Sir John Robinson *v.* Comyns.

after

after forfeiture, be re-conveyed to the heir at law, although the heir at law took the equity of redemption by descent, yet that the *legal estate* must, on such re-conveyance, vest in him as *a purchaser* (q); and, consequently, go to his heirs *on the part of his father:* for a mortgagee is, till foreclosure, considered, even in equity, as a bare trustee for the mortgagor, as to the inheritance of the premises (r); and we have shewn above that, on the conveyance of the legal estate by a trustee to the *cestuy que trust*, such legal estate shall vest in him by purchase; when his equitable interest will be merged.

And here it may not be altogether useless to remark, that a consideration is not requisite to change the descent from the maternal to the paternal line; as in the

(q) See the case of Benson *v.* Scott as reported in 12 *Mod.* 49. and 7 *Durnf.* & *East*, 103. Doe *d.* Harman & *Ux.* *v.* Morgan.

(r) 1 *Atk.* 606.

 cases

cafes of feoffment and re-enfeoffment;—Fine *fur done, grant, & render*, &c. (*f*).

Rent. If a perfon fo feized make a feoffment IN FEE, referving a rent to him and his heirs, the rent fhall go to his heirs *ex parte* PATERNA (*t*).

But otherwife of a rent referved on a grant of fuch eftate *for life* or *in tail* (*u*); for, on fuch grant, the reverfion was left in the grantor, which muft defcend to his [184] heirs *on the part of his mother*; and the rent fhall follow fuch reverfion as its incident: but when the grant was *in fee*, there was *no* fuch reverfion to which it could attach; and, confequently, it muft be confidered fubftantively as a *new eftate*.

Leafe for lives. So if A. having a leafe to her and her heirs for lives, devife it to her daughter,

(*f*) See 2 *Atk.* 150. Lloyd *v.* Spillet. *Bro. Garde*, 5. 93.; and *Carth.* 141. Rice *v.* Langford.

(*t*) *Co. Litt.* 12. b.

(*u*) *Co. Litt.* 12. b. and *ante*, p. 171. (*u*).

and

and afterwards the leafe be renewed; this laft is *a* NEW *leafe*, and, as fuch, fhall defcend to the heirs on the part of the father(*x*).

Thirdly, as to A FINE. *Fine.*

A FINE *levied* BY TENANT IN TAIL *affects not the reverfion or remainders over*, WHEN IN ANOTHER PERSON(*y*).

But if HE HAS THE FEE IN HIMSELF, *the fine extinguifhes the eftate tail, and brings the reverfion into poffefsion*(*z*).

And,

(*x*) *Precedents in Chancery*, 319. Mafon *v.* Day; and 1 *Atk.* 480. Pierfon *v.* Shore.

(*y*) (So they claim within the time prefcribed.) 1 *Cruife*, 208. *Co. Litt.* 372. a.

(*z*) 1 *Cruife*, 274. *Carth.* 257. 261.

But this muft be underftood of a fine *with proclamations:* for a fine *without* proclamations, though it will work a difcontinuance, will not deftroy an eftate-tail. See 3 *Co.* 86. a. *Bull. N. P.* 229. 1 *Cru.* 151.

Though a fine fhall be intended to have been levied with proclamations till the contrary be fhewn. 3 *Co.* 86. b.

 But

And, consequently, this being *the old fee*, if it had descended *ex parte materna* before the levying of the fine, it must do [185] so afterwards; as the fine does not affect it otherwise than by bringing it into possession:

Grant & Render.

Unless it be A FINE SUR DONE, GRANT, & RENDER: *for if a person, seized* EX PARTE MATERNA, *levy* SUCH FINE, *it will operate as a feoffment and re-enfeoffment, and give him* A NEW ESTATE; *which shall, consequently, descend to his heirs* ON THE PART OF HIS FATHER(*a*).

But if this intendment be rebutted, then it will be necessary to *prove* the proclamations, (as they must be proved to bar a stranger). *Bull. N. P.* 229.

And note; that the statute 4 *Hen.* 7. *c.* 24. does *not* extend to fines levied in courts of ancient demesne; and, therefore, though fines levied there will cause a discontinuance, they will not bar an entail, unless by special custom. 1 *Salk.* 339. Hunt *v.* Bourne. *Jenk. Cent.* 87. *pl.* 68. *Cruise on Fines*, 93. 175. 2 *Watk. Copyh.* 41.

(*a*) *Carth.* 140. Rice *v.* Langford. *Dyer*, 311. *pl.* 84.

But

But it muſt be obſerved that, although on a fine *ſur done, grant, & render*, the uſes rendered to the cognizor are new uſes, becauſe the eſtate has paſſed to the cognizee; yet, as ſuch fine is a double fine, comprehending the fine *ſur cognizance de droit come ceo*, &c. and that *ſur conceſsit*, the cognizee takes his eſtate by the fine *ſur cognizance*, &c. and the eſtate or uſes *ſo rendered by him*, is a portion of, or are ſerved by, *that* eſtate; and, therefore, in caſe ſuch eſtate be not wholly rendered to the cognizor or a ſtranger, but a part be alſo limited to the cognizee or his heirs, ſuch part is a portion of the eſtate ſo taken on the fine *come ceo*, &c.; and, conſequently, the uſes ſo limited on the fine *ſur conceſsit* to the cognizee or his heirs, are not new uſes, but muſt be conſidered as his old reverſion: as if a fine be levied to baron and feme and the heirs of the baron, and they grant and render, by the ſame fine, the ſame tenements to the cognizor for the term of the life of the baron, remainder to a ſtranger for life, with remainder to the heirs of the baron; the heirs of the baron ſhall take by deſcent,

and not by purchase; the portion, so ultimately limited, continuing in the baron as his reversion, and not rendered by the cognizor, as the estate taken by him is rendered by the cognizee (*b*).

So if the render be in tail, (*i. e.* of a *portion* only of the estate,) the cognizee shall have the reversion to his own use (*c*).

Sur cognizance, &c.

The fine *sur done, grant, & render*, is, however, THE ONLY SORT OF FINE *which gives* A NEW ESTATE: for if a person, seized *ex parte materna*, levies a fine *sur cognizance de droit, come ceo*, &c. and either makes no declaration of the uses, or declares it to be to the use of himself and his heirs, the lands will still descend *ex parte materna*; because it is still *the old use*; which, consisting in trust and confidence, will follow the nature of the land, and will descend as the land would have

(*b*) See *Dyer*, 237. *pl.* 31. Bromley *v.*. Bennet; and *Pasch.* 15 *Ed.* 3. there cited.

(*c*) See *Moore*, 46. *pl.* 138; *per Dyer*, *quod Benlows & anters Sergeants Concesserunt.*

descended

descended if no alteration had been made: and it is totally immaterial whether the use be expressly declared upon such fine, or permitted to rise by implication (*d*). [186]

Fourthly, as to A RECOVERY. *Recovery.*

A common recovery is now considered merely as "a form of conveyance," or common assurance (*e*); and, therefore, if no uses be declared, nor any raised to the recoveror, its operation is the same, as to this point, as a feoffment or fine. Each of these conveyances passes a fee (*f*); but the fee effected by either is immediately to the use of the person conveying (if such appears the intention of the parties (*g*)—); **Is a common assurance.** **Use.**

(*d*) 1 *Cruise*, 71. And see also *Carth.* 140—1.; *Chetwynd on Fines*, sec. 12. p. 84. and *Barnes*, 467. Armstrong *d.* Neve & *al.* *v.* Woolsey & *al.*

(*e*) See 1 *Wils.* 73. 1 *Burr.* 115, 116. 1 *Co.* 15. b. *Cro. Jac.* 643. *pl.* 3. *Hob.* 28.

(*f*) See 1 *Burr.* 92.; and *ante*, Of Feoffment and Fine, p. 179. 184.

And see *Hob.* 322—3.

(*g*) See *Gilb. Rep.* 17. and note; and *Dougl.* 26.

 and

and as he is thus *in* of his *ancient uſe*, and the ſtatute uniting the poſſeſsion to it, he is conſidered as *in* of his OLD ESTATE; and, conſequently, the deſcent remains as before.

[187] By tenant in fee.

Thus if a perſon, ſeized ex parte materna IN FEE, *ſuffers a recovery, and no uſes be declared, nor any conſideration appear to raiſe them to the recoveror,* THE USE RESULTS; *or if the uſes be declared to the recoveree and his heirs, he is in of* HIS OLD ESTATE, *which ſhall continue to deſcend as if no recovery had been ſuffered*(*h*).

By tenant in tail. [188]

But, *if* A TENANT IN TAIL, *ſeized by deſcent* ex parte materna, *ſuffer* A RECOVERY, *the fee effected by ſuch recovery ſhall deſcend to his heirs* ON THE PART OF HIS

(*h*) 1 *And.* 127. *pl.* 173. Dowlman's caſe. *Hob.* 27. 9 *Co.* 7 b. Dowman's caſe. *Dyer*, 146. *pl.* 70, 71. Villers & Beaumont. 2 *Brownl.* 171. Rowles *v.* Oſborne. *Cro. Jac.* 643. Ferrers & *al. v.* Fermor & *al. Gilb. Rep.* 16. 18. 1 *Atk.* 9. in Stapilton *v.* Stapilton. 9 *Mod.* 172. Lord Derwentwater's caſe. 1 *Wilſ.* 74.

MOTHER;

MOTHER: *but if he took* THE ESTATE TAIL *by* PURCHASE, *or* BY DESCENT EX PARTE PATERNA, *the fee ſo effected ſhall go to his heirs* ON THE PART OF HIS FATHER: and this whether the lands be freehold or copyhold (*i*).

If a fine and recovery be for a particular purpoſe, the ſeveral deeds, fine, and recovery, ſhall be conſidered as ONE CONVEYANCE, and neither be permitted, by its peculiar properties, to operate to the deſtruction of the intent of the parties (*k*). [190] One conveyance.

As where baron and feme covenanted to levy a fine of lands deſcended to the feme

(*i*) 1 *Wils.* 66. Martin *d.* Tregonwell *v.* Strachan & *al.* 4 *Brown's Ca. in Parl.* 486. S. C. 5 *Durnf. & Eaſt*, 104. Roe *d.* Crow *v.* Baldwere & *al.*

(*k*) 2 *Co.* 75. Cromwell's caſe. 3 *Atk.* 748. Parſons *v.* Freeman. *Gilb. Rep.* 17. Lord Altham *v.* Earl of Angleſea. *Cro. Jac.* 643. Sir John Ferrers & *al. v.* Sir Richard Fermor & *al.* 2 *Burr.* 1131. Selwyn *v.* Selwyn. 1 *J. Blackſt. Rep.* 222. 251. S. C.; and 1 *Ibid.* 605. Roe *d.* Noden *v.* Griffith. 5 *Burr.* 2787. Vaughan *d.* Atkins *v.* Atkins.

from

from her mother, which was levied accordingly, and a recovery afterwards suffered; it was held, that the deed, fine, and recovery made but one conveyance; that the estate moved originally FROM THE COGNIZOR, (which, in this case, was *the*
[191] *feme*(*l*)—): and that what the cognizor had not parted with was still in such cognizor; and, therefore, so much as was not declared of the uses upon the recovery was still to *the* OLD *use*; the nature of the common recovery being but as an instrument for raising the use(*m*).

Merger of the equitable estate in the legal,

By descent of the legal fee;

And lastly, *when the* LEGAL ESTATE *descends in fee-simple* ex parte materna, *and the* EQUITABLE ESTATE ex parte paterna, *or* vice versa, THE EQUITABLE ESTATE SHALL MERGE IN THE LEGAL; *and*

(*l*) 2 *Co.* 57. b. Beckwithe's case; 77. b. Cromwell's case; and *Dougl.* 44, 45. Hurd *v.* Fletcher & *al.*

(*m*) Abbot *v.* Burton, 11 *Mod.* 181.; and in 14 *Vin. Abr.* Heir, (W. 2.) *pl.* 6. *Com. Rep.* 160. S. C.; and see 5 *Com. Dig.* 582. Uses, (D. 2.) and 2 *Co.* 58. b.; and *Cro. Jac.* 643. *pl.* 3.

both

both ſhall follow the line through which the LEGAL *eſtate deſcended*(n).

So alſo if the equitable eſtate had deſcended *ex parte materna* and the heir had had the *legal* eſtate BY PURCHASE, the equitable eſtate would merge and be utterly extinguiſhed in the legal; which would, of courſe, go to the heirs *on the part of the father*(o). By purchaſe. [192]

And, by WILLES, J. "when the queſtion is between thoſe of the paternal and *Paternal heirs preferred.*

(n) *Dougl.* 771—780. Goodright *leſſee of* Alſton *v.* Wells & *al.* 1 *Brow. Ca. Ca.* 363. Wade *v.* Paget. 3 *Veſ. Jun.* 126. Philips *v.* Brydges; and *Ibid.* 339. Selby *v.* Alſton.

So the poſſeſſion of lands was incompatible with an uſe iſſuing out of them; and, therefore, on the *ceſtuy que uſe's* acceſſion to the lands, the uſe ceaſed, and was abſorbed in the legal eſtate. *Plowd.* 44.

And it is ſaid that, if one have *lands* of the part of his father and *a rent out of the ſame lands* on the part of his mother, the rent will become extinct; and cannot be revived or divided though he die without iſſue. 18 *Viner*, 495. Rent, (T.) *pl.* 9. See *Co. Litt.* 149. b.

(o) *Dougl.* 771. Goodright *d.* Alſton *v.* Wells & *al.* and Doe *d.* Balch *v.* Putt, or Pott, cited; and *ante*, 182.

thoſe

those of the maternal line, the law always gives the preference to *the former* (p)."

Two titles. And, by BULLER, J. as "where two titles unite, the party shall be in of the best," and as the clear *legal* fee-simple is, in these cases, the best, the party shall therefore be in of it (q).

(p) *Dougl.* 778.

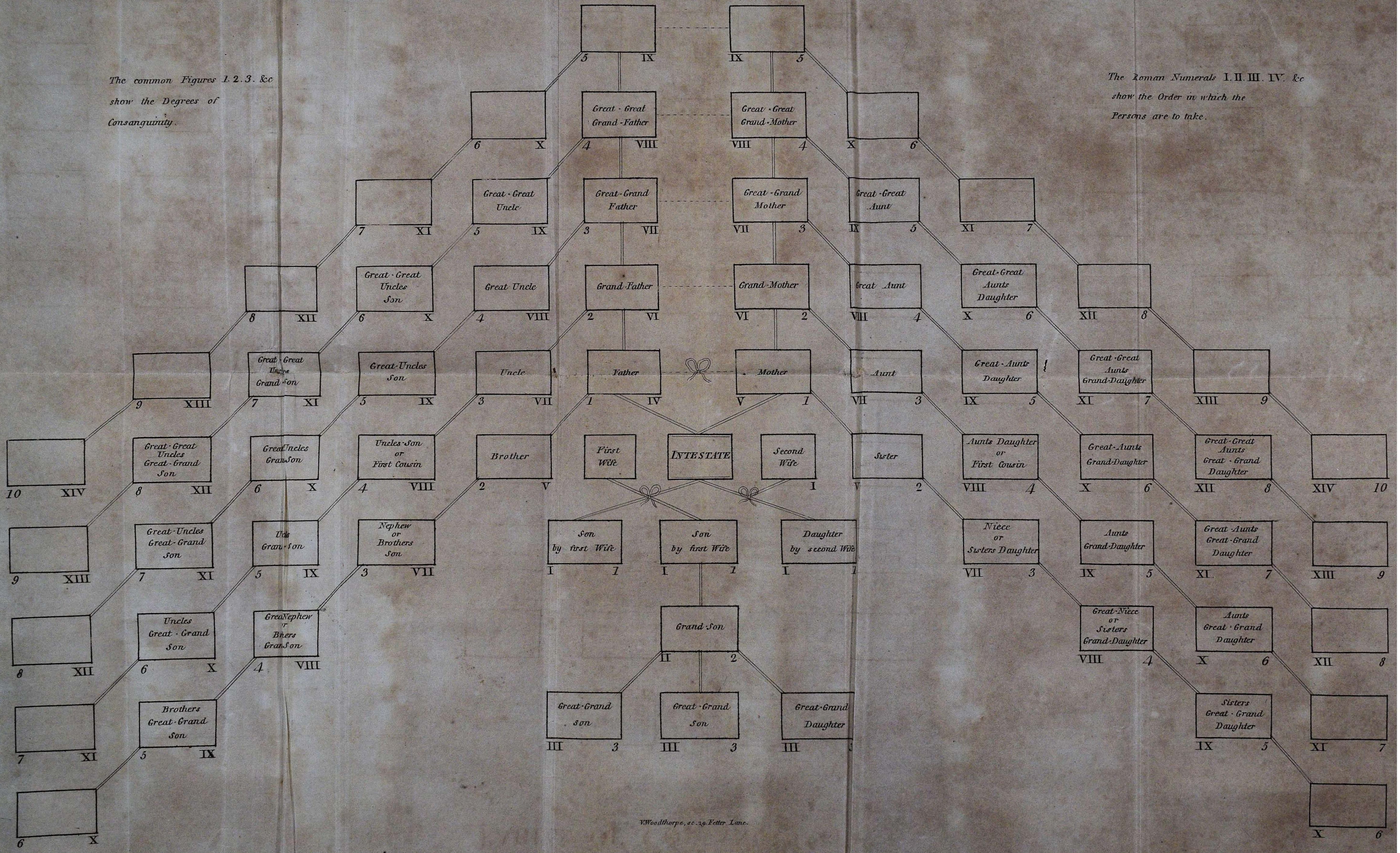
(q) *Ibid.* 779.

APPENDIX.

TABLE OF CONSANGUINITY.

The common Figures 1. 2. 3. &c show the Degrees of Consanguinity.

The Roman Numerals I. II. III. IV. &c show the Order in which the Persons are to take.



V. Woodthorpe, sc. 29 Fetter Lane.

APPENDIX.

Of the Diſtribution of the Perſonal Effects of an Inteſtate.

IF the inteſtate leave a widow and children, the widow ſhall take a third part of the ſurplus of his effects. If he leave no children, ſhe ſhall have a moiety (*a*). Wife.

But the ſtatute does not extend to the eſtate of a *feme covert*; and, there- Huſband.

(*a*) *Stat.* 22 & 23 *Car.* 2. *c.* 10. *ſ.* 5, & 6.
And note; the widow takes as widow, by the expreſs words of the ſtatute, and not as being of kin; for a wife is (as ſuch) of no kin to her huſband. See 3 *Atk.* 761. Worſley *v.* Johnſon.

fore,

fore, the husband is entitled to her effects(*b*).

Children. If the intestate leave children, his effects, (*i. e.* the whole if he leaves no widow, or two-thirds if he does leave one,) shall be equally divided among his children(I) (*c*); whether male or female; whether by the same or different wives(*d*); whether posthumous or born in his lifetime(*e*); whether papist or protestant(*f*). Or, if he leave but one child, to such only child(*g*).

(I)

(*b*) *Stat.* 29 *Car.* 2. *c.* 3. *s.* 25. 2 *Bl. Comm.* 515. *ch.* 32. 1 *Pr. Wms.* 379. Squib *v.* Wyn. 3 *Atk.* 526. Elliot *v.* Collier.

(*c*) *Stat.* 22 & 23 *Car.* 2. *c.* 14. *s.* 5.

(*d*) For the half-blood shall take equally with the whole. *Carth.* 51. Brown *v.* Farndell & *al.* *Show. Parl. Cas.* 108. 110. Watts & *al.* *v.* Crooke. *Bunbury*, 158. Janson *v.* Bury; and Wale *v.* Theedham, there cited.

(*e*) 2 *Atk.* 115. Wallis *v.* Hodson & *Ux.* 1 *Ves.* 156. Burnet *v.* Mann.

(*f*) 3 *Pr. Wms.* 49. D'Avers *v.* D'Ewes.

(*g*) *Prec. Chanc.* 21. Palmer *v.* Garrard. *Carthew.* 52. Brown *v.* Farndell. 3 *Pr. Wms.* 49. note (D). D'Avers *v.* D'Ewes.

If *ſome* of the children of the inteſtate die in his life-time leaving children, ſuch children ſhall ſtand *in loco parentis*, and ſhall take their deceaſed parent's ſhare (*h*): as if there be two ſons, and one die leaving three children, and the other ſurvive the inteſtate; the three children of the deceaſed ſon ſhall have one moiety, and the ſurviving ſon the other. Repreſentatives among deſcendants.

And this right of repreſentation among *the deſcendants* of the inteſtate is not confined within any degree (*i*).

But if *all* the children of the inteſtate die in his life-time leaving children, then the diſtribution ſhall be (II) to them (ſuch iſſue) *per capita*; they now claiming *in their own right* and *not by repreſentation*. For where *all* the parents are deceaſed, their children take *per capita*; but when *ſome only*, they take *per ſtirpes* (*k*). Taking *per capita*, or *per ſtirpes*. Grand-children. (II)

And

(*h*) *Stat.* 22 & 23 *Car.* 2. *c.* 10. *ſ.* 5.

(*i*) See the *Stat.* and *poſt.* (*m*).

(*k*) *Prec. Chanc.* 54. Walſh *v.* Walſh. 2 *Veſ.* 215. in the caſe of Lloyd *v.* Tench. 3 *Pr. Wms.* 50. in the

Hotchpot.

And note; when diſtribution is made among children, they muſt bring their advancement into hotchpot, as by the act is directed (*l*).

Great-grand-children. (III)

If there be no grandchildren ſurviving the inteſtate, then the great-grandchildren (III) ſhall take equally *per capita*; and ſo on; the lineal deſcendants of the inteſtate *in infinitum*, being preferred to all aſcendants or collaterals (*m*).

Father. (IV)

If the inteſtate leave no children, or repreſentatives of them, the father (IV), if living, ſhall take, in excluſion of the mother, brothers, and ſiſters, &c. (*n*).

the caſe of D'Avers *v.* D'Ewes. 1 *Pr. Wms.* 459. Bower *v.* Littlewood. 1 *Atk.* 454. Durant *v.* Preſtwood. 2 *Black. Comm.* 517. ch. 32.

(*l*) *Stat.* 22 & 23 *Car.* 2. *c.* 10. *ſ.* 5.

(*m*) See the *Stat. Car.* 2. 1 *Com. Dig.* 273. Adminiſtration, (H.) cites *Raym. (Sir Thomas)*, 500. 1 *Pr. Wms.* 27. 1 *Atk.* 457, 458. 2 *Pr. Wms.* 346.

(*n*) 2 *Bla. Comm.* 517. ch. 32.

If the father be dead, the (V) mother, brothers and ſiſters of the inteſtate, ſhall take equally(*o*): as if there be a mother and four brothers or ſiſters, each ſhall take a fifth (*p*). Mother and brothers and ſiſters. (V)

So if ſome, or all, of ſuch brothers or ſiſters die, leaving children, ſuch children ſhall ſtand *in loco parentis:* as if there be a widow, mother, and the children of a deceaſed only brother, the widow ſhall take her moiety, and the mother and the children of the brother ſhall have each a fourth; *i. e.* the mother one fourth, and the children the other; for the children take *quaſi* by repreſentation (*q*). Repréſentatives.

(*o*) *Stat.* 1 *Jac.* 2. *c.* 17. *ſ.* 7. 2 *Bl. Comm.* 516. ch. 32.

(*p*) See 1 *Strange*, 710. Keilway *v.* Keilway. 2 *Pr. Wms.* 344. S. C.

(*q*) See *Stat.* 1 *Jac.* 2. *c.* 17. *ſ.* 7. 2 *Pr. Wms.* 344. Keilway *v.* Keilway. 1 *Atk.* 455. Stanley *v.* Stanley.

Among collaterals.

But this right of reprefentation, being among *collaterals*, fhall not extend further than brothers or fifters children (*r*).

Mother alone.

If there be no brother, fifter, or defcendant of fuch brother or fifter, the mother fhall take the whole; fhe having been entitled before the ftatute 1 *Jac.* 2., though there *were* brothers or fifters; and that ftatute does not take away her right but only as to them and their iffue (*f*): for to a *grandfon* of a brother, who muft claim in his own right, the mother fhall be preferred (*t*).

Mother-in-law.

But note; a *mother-in-law* fhall take nothing (*u*).

(*r*) 1 *Atk.* 457. Stanley *v.* Stanley.

(*f*) See the *Stat.* and 2 *Black. Comm.* 516. ch. 32. 11 *Viner.* 196. (Executor, Z. 12.) Jackfon *v.* Prudehome. 1 *Atk.* 457. Stanley *v.* Stanley.

(*t*) See the *Stat.* and *poft.* And fee alfo 1 *Atk.* 457. Stanley *v.* Stanley.

(*u*) 2 *Pr. Wms.* 216. Duke of Rutland *v.* Duchefs of Rutland.

If

If there be no mother, the brothers and ſiſters take equally; their children ſtanding in *loco parentis*(*x*). But note; repreſentation among collaterals ends with ſuch children: for if there be a brother's grandſon and a ſiſter's ſon, the ſiſter's ſon ſhall exclude the grandſon, who ſhall take nothing(*y*). So a living uncle ſhall exclude a deceaſed uncle's ſon(*z*). Brothers and ſiſters where no mother.

If there be neither brother nor ſiſter, nor children of a brother or ſiſter, then diſtribution ſhall be made, without preference, to thoſe, whoever they may be, who are next in degree of kindred to the inteſtate. Next of kin.

And the degrees of kindred ſhall be computed according to the civil law(*a*). According to the civil law.

(*x*) See the *Stat. Car.* II.

(*y*) 1 *Pr. Wms.* 25. Pett's caſe. *Comyns's Rep.* 87. S. C. 1 *Lord Raym.* 571. S. C. and ſee *poſt.*

(*z*) See *poſt.* p. 309.

(*a*) *Prec. Chanç.* 593. Mentney *v.* Petty. 2 *Atk.* 117. Wallis *v.* Hodſon. 1 *Veſ.* 334. Thomas *v.* Ketteriche. 2 *Bla. Comm.* 504. 515. ch. 32.

Paternal and maternal lines. And if there are relations both on the father's and mother's ſide, in equal degree, they ſhall take together (*b*).

Grandfather. If there be neither brother nor ſiſter, nor children of a brother or ſiſter, the grandfather, (or the grandmother, if he (VI) be dead,) ſhall next take (VI). For although the grandfather is in equal degree with the brother or ſiſter, yet *they* ſhall always take firſt and exclude *him* (*c*).

But, if there be children of brothers or ſiſters, who do not claim by repreſentation but in their own right, (as where *all* the brothers and ſiſters, and mother alſo (see page 305, are deceaſed,) the grandfather ſhall be preferred; he being nearer in degree. For, as the grandfather is nearer than the uncle, and, there-

(*b*) 1 *Pr. Wms.* 53. More *v.* Barham (cited). 1 *Com. Dig.* 273. Adminiſtration, (H). cites *Raym.* (*Sir Thomas*), 500.

(*c*) See 3 *Atk.* 762. Evelyn *v.* Evelyn; and S. C. more fully in *Burn's Eccl. Law*, 348.

fore,

fore, ſhall exclude him(*d*); ſo, as the nephew, or brother's child, is in the ſame degree as the uncle(*e*), the grandfather muſt, for the ſame reaſon, exclude him (the nephew) alſo (*f*).

Great-grandfather, or great-grandmother, uncle, aunt, nephew and niece. (VII)

If there be no grandfather, then the great-grandfather, (or great-grandmother, if he be dead,) uncles, aunts, nephews, and nieces, (or brothers or ſiſters children claiming *in their own right*,) ſhall (VII) take together; being in equal degree(*g*).

For the living uncles and aunts ſhall exclude the children of deceaſed uncles and aunts; ſuch children being too remote to claim *by repreſentation*; and, if

(*d*) *Prec. Chanc.* 527. Woodroffe *v.* Wickworth. *Ibid.* 593. Mentney *v.* Petty. 1 *Pr. Wms.* 41. Blackborough *v.* Davis. 1 *Lord Raym.* 684. S. C.; and ſee 1 *Veſ.* 215. Lloyd *v.* Shore.

(*e*) 1 *Atk.* 454. Durant *v.* Preſtwood.

(*f*) See 2 *Veſ.* 213. Lloyd *v.* Tench.

(*g*) *Preced. in Chanc.* 593. Mentney *v.* Petty. 1 *Atk.* 454. Durant *v.* Preſtwood. 2 *Veſ.* 213. Lloyd *v.* Tench.

confidered as claiming *in their own right*, they are a degree further from the inteftate (*h*): as the nephews, or nieces, or children of brothers or fifters, fhall exclude the grandchildren of fuch brothers or fifters when claiming in their own right; as before obferved (*i*).

Great-great-grandfather, or mother, great-uncle, firft-coufin, and great-nephew.

If there be neither great-grandfather, uncle, aunt, nephew, or niece, then the great-great-grandfather, (or great-great-grandmother, if he be dead,) great-uncle, firft-coufin, (or uncle's fon,) and great-nephew, (or brother's grandfon, claiming in his own right, and not by reprefenta-
(VIII) tion,) fhall (VIII) take together; being in equal degree (*k*).

And note; that the diftribution is not to be made till a twelve-month after the

(*h*) 1 *Pr. Wms.* 594. Bower *v.* Littlewood. *Prec. Chanc.* 28. Man *v.* Harding. 11 *Viner*, 195. Executor, (Z. 11.) *pl.* 15.

(*i*) P. 307.

(*k*) See 1 *Vef.* 333. Thomas *v.* Ketteriche.

inteftate's

inteſtate's deceaſe; (ſee the *Stat.*); *yet the intereſt veſts immediately*(*l*) *in the perſon entitled*, (ſaving as to a poſthumous claimant): ſo that if he die within the year, his ſhare ſhall go to his repreſentative(*m*).

And note alſo; that, after the children of brothers and ſiſters, diſtribution muſt always be made *per capita* among collaterals (*n*).

(*l*) *i. e.* On the death of the inteſtate; *Carth.* 55. For if a perſon had a brother and ſiſter, and the ſiſter had married and died before the inteſtate, the huſband of the ſiſter ſhall not take any thing.

(*m*) 2 *Pr. Wms.* 442. Edwards *v.* Freeman. 3 *Pr. Wms.* 49. note (D.) Grice *v.* Grice. *Carth.* 52. Brown *v.* Farndell & *al.*

(*n*) *Comyns's Rep.* 87. Pett. *v.* Pett. 1 *Lord Raym.* 471. S. C. 1 *Pr. Wms.* 25. S. C. 1 *Ibid.* 593. Bowers *v.* Littlewood. *Prec. Chanc.* 28. Maw *v.* Harding. *Ibid.* 54. Walſh *v.* Walſh. 3 *Pr. Wms.* 50. D'Ayers *v.* D'Ewes.

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